No. 14-_____

IN THE
Supreme Court of the United States

KOLON INDUSTRIES, INC.,
Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal recusal statute mandates that a federal judge "shall … disqualify himself" when he or any of his former law partners have served as a lawyer in the matter in controversy. 28 U.S.C. § 455(b)(2). The statute places no obligations, substantive or procedural, on the parties, and does not require that any party move for disqualification. The statute further prohibits the parties from waiving disqualification when it is required under section 455(b). *Id.* § 455(e). The question presented is:

Under 28 U.S.C. § 455(b), is a federal judge relieved of his mandatory statutory duty of self-disqualification, simply because neither party filed a timely motion to disqualify the judge?

CORPORATE DISCLOSURE STATEMENT

In 2010, Kolon Corporation (then known as "Kolon Industries, Inc.") adopted a holding company structure, separating its industrial manufacturing operations and assets into a newly-formed public company. The new company adopted the English name "Kolon Industries, Inc.," while the original company, which retained the investment assets and portfolio management functions, adopted the English name "Kolon Corporation."

Kolon Corporation has no parent corporations, and no publicly held company owns 10% of more of the stock of Kolon Corporation. Kolon Corporation owns more than 10% of shares in the new Kolon Industries, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutory Provisions

TABLE OF AUTHORITIES
(continued)

Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 748 F.3d 160 (4th Cir. 2014) and reproduced in the Petition Appendix ("App.") at 1a-51a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 846 F. Supp. 2d 515 and reproduced at App. 52a-88a.

JURISDICTION

The judgment of the Fourth Circuit was entered on April 3, 2014. App. 89a. The Fourth Circuit stayed its mandate pending the filing of a petition for a writ of certiorari from this Court. App. 90a. On June 24, 2014, the Chief Justice extended the time within which to file a certiorari petition to July 23, 2014.

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1357 and 15 U.S.C. § 26, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The federal recusal statute, 28 U.S.C. § 455, is reproduced at App. 91a-94a.

STATEMENT OF THE CASE

A. Introduction

The federal recusal statute provides that a federal judge "shall … disqualify himself" when, during the judge's tenure in private practice, he or his law partners served as lawyers "in the matter in controversy." 28 U.S.C. § 455(b)(2). Here, the

presiding district judge was a partner at a law firm that had served as trial counsel to Respondent E.I. du Pont de Nemours and Company ("DuPont") in a prior litigation that became a matter in controversy in this case. The lawyers with whom the judge had practiced represented DuPont in that proceeding, and the judge himself was involved in the case. Nevertheless, the judge refused to recuse himself on the basis that Petitioner Kolon Industries, Inc. ("Kolon") did not file a timely motion for disqualification.

The Fourth Circuit, in a divided opinion, excused the district judge's failure to disqualify himself. The court of appeals held that 28 U.S.C. § 455(b) contains "a judicially implied timely-filing requirement." App. 35a. This holding — which finds no support in the statutory text or history — implicates a deep and longstanding split among the circuits. In reading an implied timeliness requirement into the federal recusal statute, the Fourth Circuit acknowledged a 7-2 circuit split. App. 17a. The court of appeals aligned itself with six other circuits — the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits. By contrast, two other courts of appeals — the Seventh and Federal Circuits — have refused to impose this judicial gloss upon the statute's mandatory disqualification duty. This entrenched circuit conflict — which is, in fact, an 8-3 split — should be resolved by this Court.

The Fourth Circuit's statutory construction is squarely contrary to the text of the statute and to congressional intent. The court of appeals majority could identify no textual support in section 455(b) for its holding, improperly relying instead on the canon

that a statute cannot be construed to have absurd results. App. 16a. Nor could the majority's decision be reconciled with the statute's prohibition on waiving disqualification when it is required. 28 U.S.C. § 455(e). Finally, the legislative history makes clear that Congress amended section 455 in 1974 to incorporate the recently adopted Code of Judicial Conduct, compliance with which is not contingent upon a party motion. Indeed, Congress disregarded a suggestion of the Department of Justice to revise the bill to include a timely filing requirement of the kind that the Fourth Circuit and likeminded courts have now imposed by judicial fiat. As the dissenting judge below observed, the majority's decision "flies in the face of the plain language and thwarts the clear congressional purpose of § 455(b)(2)." App. 37a (Shedd, J., dissenting).

By permitting a judge subject to a mandatory recusal duty to continue presiding over the case, the implied timeliness rule undermines section 455's objective of "'promot[ing] public confidence in the integrity of the judicial process.'" App. 43a (Shedd, J., dissenting) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)). "The power and the prerogative of a court … rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minn. v. White,* 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). This Court should grant certiorari in order to resolve the longstanding disagreement amount circuits on the requirements of section 455, and to vindicate the congressional insistence on mandatory judicial

disqualification as a safeguard of the public confidence in judicial impartiality.

B. Factual Background

DuPont is a chemical company that produces Kevlar, a high-strength synthetic para-aramid fiber used in body armor, tires, fiber optic cables, and a variety of other industrial applications. App. 3a. DuPont invented para-aramid fiber in 1965, and for a long period controlled the entire U.S. para-aramid market because of its patents. *Id.* In 1987, a Dutch company Akzo N.V. ("Akzo"), subsequently purchased by a Japanese company Teijin Ltd. and renamed Teijin Aramid ("Teijin"), introduced a competing para-aramid fiber to the U.S. market. *Id.*

During the 1980s, DuPont and Akzo engaged in protracted global patent litigation related to the manufacture and sale of para-aramid fiber. App. 7a. In one such dispute, Akzo and DuPont sued each other in the United States District Court for the Eastern District of Virginia over the infringement and invalidity of an Akzo para-aramid patent. App. 7a; 55a-56a. One of the two law firms representing DuPont in that litigation was McGuire Woods & Battle (now "McGuireWoods"). App. 7a; 55a-56a. The *Akzo* litigation ended in 1986, *see* App. 56a, and DuPont and Akzo subsequently reached a global patent settlement in 1988. *See* Karel F. Mulder, *A Battle of Giants: The Multiplicity of Industrial R&D that Produced High-Strength Aramid Fibers*, 21 Tech. in Soc'y 37, 56, 58 (1999). The United States para-aramid market remains highly concentrated between DuPont and Teijin, which together account for 99% of all sales. App. 3a.

Kolon, a South Korean company, began researching para-aramid fibers in 1979, and introduced its competing Heracron para-aramid product to the United States market in 2006. App. 4a. Over the next four years, from 2006 to 2009, Kolon attempted to penetrate the United States market, but never achieved more than a de minimis share of that market. App. 4a.

C. Procedural Background

In 2009, DuPont brought suit against Kolon, claiming trade-secret misappropriation. App. 5a. Kolon counterclaimed, alleging that DuPont had monopolized and attempted to monopolize the United States para-aramid market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* App. 5a-6a. Kolon presented evidence that DuPont considered Kolon's market entry to be a threat, and began to identify those segments of the para-aramid market that were particularly hospitable to a competitor's entry. App. 4a. As Kolon argued, DuPont then embarked on a strategy of executing multi-year restrictive supply agreements with high-volume customers in each segment, requiring these customers to purchase most or all of their para-aramid fiber from DuPont. *Id.*

The district court initially dismissed Kolon's antitrust counterclaim, and granted partial final judgment on that counterclaim under Federal Rule of Civil Procedure 54(b). The Fourth Circuit later reversed that dismissal, holding that Kolon had adequately pleaded both the actual and attempted monopolization claims. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435 (4th Cir. 2011).

D. The District Court's Recusal Ruling

Because there had not been discovery on the antitrust counterclaim that was remanded by the Fourth Circuit on March 11, 2011, the district court elected to proceed to trial first on the trade-secret claim. Beginning in July 2011, and repeatedly thereafter, Kolon raised the question of whether the district judge had a duty to recuse himself under 28 U.S.C. § 455(b). McGuireWoods, DuPont's counsel in the district court proceedings, had also served as counsel to DuPont during the 1980s' *Akzo* litigation in the Eastern District of Virginia. App. 7a. During that time, the district judge was a partner (and head of litigation) in McGuireWoods's Richmond office.

As Kolon argued, the *Akzo* litigation was central to both its defense of the trade-secrets claim (prior to severance) and the maintenance of its antitrust counterclaim. App. 8a. Among Kolon's defenses to DuPont's trade-secret claims was that DuPont made public many of these trade secrets during the *Akzo* litigation. *See* App. 8a; 50a-51a (Shedd, J., dissenting). Kolon also argued that the *Akzo* litigation — which formed part of the actions undertaken by DuPont over time to protect its dominant market position — was evidence of DuPont's anticompetitive practices and intent to monopolize the United States para-aramid market. *See* App. 8a.

Kolon sought extensive discovery regarding the *Akzo* litigation. DuPont's counsel originally indicated that no responsive documents existed, including in the files of its co-counsel in the *Akzo* case, the Fitzpatrick Cella law firm. App. 56a. Not trusting that report, Kolon subpoenaed the Fitzpatrick Cella

law firm, which disclosed that it retained extensive files from the *Akzo* litigation. DuPont subsequently made an initial production of about thirty boxes of responsive Fitzpatrick Cella documents, but claimed privilege as to the vast majority of the documents. Buried within that production was a document index that indicated correspondence between the presiding judge and Fitzpatrick Cella at the outset of the case. *See* App. 8a-9a; 56a.

DuPont initially claimed attorney-client privilege over the document in question, an assertion that the district judge later found to be groundless. The document revealed that the district judge had a telephone conversation about the case with the lead lawyer from the firm that served as McGuireWoods' co-counsel (Fitzpatrick Cella) and subsequently sent to the co-counsel a facsimile copy of the complaint filed in the case. App. 8a-9a. The billing records of DuPont counsel in this case, produced in conjunction with a request for attorney's fees, disclosed that DuPont counsel here had earlier identified the district judge's participation in the *Akzo* case, but DuPont never disclosed that participation to either Kolon or the district judge.

Prior to trial, on July 20, 2011, Kolon raised the question of the district judge's recusal. Kolon did so in a brief opposing DuPont's proposed adverse-inference instruction premised on the invocation of the Fifth Amendment by a former Kolon consultant who was DuPont's expert witness during the *Akzo* litigation. *See* App. 9a; 57a. Kolon explained that adjudication of the proposed jury instruction would require the district judge to consider the disclosure of DuPont's trade secrets during the *Akzo* litigation by

DuPont's counsel (including the judge's former law partners) and DuPont's claim of privilege, to which the judge and his former partners were a party, and cited the governing Fourth Circuit precedent under 28 U.S.C. § 455(b)(2). The district judge stated that, despite having reviewed the relevant documents, he had no recollection about his involvement in the *Akzo* litigation. App. 9a-10a; 59a. The district judge did not otherwise address the question of whether he had a duty to recuse under 28 U.S.C. § 455(b)(2).

DuPont's trade-secrets claim proceeded to trial, and the jury entered a $919.25 million verdict against Kolon. After the verdict, on September 21, 2011, the district court severed Kolon's antitrust counterclaim from the trade-secrets claim, and, eventually, after resolving post-trial motions, entered a final judgment on the trade-secrets claim.

During discovery on its antitrust counterclaim, Kolon sought (and DuPont opposed) discovery of the *Akzo* litigation documents. *See* App. 8a; 60a-61a. Thereafter, on November 30, 2011, prior to the deadline for summary judgment briefing in the antitrust case, Kolon filed a formal motion seeking the district judge's recusal. *See* App. 10a; 61a.[1] Kolon argued that, because the *Akzo* litigation was a "matter in controversy," the district judge had to recuse himself under 28 U.S.C. § 455(b)(2) based on

[1] Subsequent to the severance of the two cases, Kolon repeatedly urged the district judge to consider his mandatory recusal duty under 28 U.S.C. § 455(b). The district judge refused to consider recusal absent the filing of a formal motion. *See* App. 10a-11a n.2.

his former law partners' and his own involvement in that litigation. *See* App. 11a, 75a-76a.[2]

The district court denied the motion. The district court first read into 28 U.S.C. § 455(b)(2) an implicit timeliness requirement. *See* App. 11a-12a; 76a. The court then concluded that Kolon's motion was untimely. *See* App. 12a; 70a-75a.[3]

Subsequent to the severance, the district judge issued several discovery rulings adverse to Kolon in the antitrust case. The district court denied Kolon's motions to compel DuPont's production of sales and cost data, and denied Kolon's request to depose a DuPont corporate representative concerning DuPont's strategic use of its supply agreements. *See* App. 6a. The district court then granted summary judgment to DuPont on both of Kolon's Sherman Act claims. App. 6a-7a. Kolon appealed that summary judgment, including the recusal ruling and all prior interlocutory rulings, to the Fourth Circuit. App. 7a.

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[2] Kolon also argued that recusal was appropriate under Canon 3(C)(1)(b) of the Code of Conduct for United States Judges, which imposes the same disqualification duty as 28 U.S.C. § 455(b), and under 28 U.S.C. § 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned." *See* App. 62a; 82a-87a.

[3] The district court reasoned that, in the alternative, recusal was not required under section 455(b)(2) because the *Akzo* litigation was not "sufficiently related" to the action below to constitute the same matter in controversy. App. 11a-12a (internal quotation marks and citations omitted); *see also* App. 77a-83a. The district court also concluded that recusal was not required under Canon 3(C)(1)(b) of the Code of Conduct for United States Judges or under 28 U.S.C. § 455(a). *See* App. 82a-87a; *see also* App. 12a n.4.

E. Proceedings in the Court of Appeals

In a divided opinion, the Fourth Circuit affirmed the district judge's refusal to disqualify himself under 28 U.S.C. § 455(b)(2). The majority held that section 455(b)(2) "include[s] a judicially implied timely-filing requirement." App. 35a. The panel majority noted that federal circuit courts are split on the question: Six other circuits had "found a timely filing requirement to be implied [in section 455(b)] despite the text's silence," while two other circuits "have refused to read in a timeliness requirement." App. 17a (citing cases). The Fourth Circuit then adopted the majority approach.

The majority acknowledged that "the textual support" for such a requirement was "lacking," but asserted that a failure to read the timeliness requirement into section 455(b)(2) would "'produce a result demonstrably at odds with the intentions of its drafters.'" App. 16a (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). The majority similarly dismissed the fact that the recusal statute prohibits the parties from waiving disqualification under section 455(b)(2), *see* 28 U.S.C. § 455(e), on the grounds that the timeliness requirement was "distinct" from waiver. App. 15a; *see also* App. 18a-19a.

Turning to the legislative history, the majority conceded that, in enacting section 455(b), Congress declined to enact the Department of Justice's recommendation to "add[] an explicit timeliness requirement" to the statute. App. 16a n.7. The majority nonetheless declared the legislative history "murky" because the federal courts had "'generally held'" that a timely objection was required under the

predecessor statute, and Congress may have "'belie[ved] that the judicial gloss on old section 455 would survive.'" App. 16a-17a n.7 (quoting *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982)). The majority also acknowledged that the timeliness requirement was contrary to the statutory "interest in removing any judge who bears even the slightest appearance of partiality." App. 18a. Nevertheless, the majority concluded that the requirement comported with the legislative intent because it prevented potential gamesmanship by the parties. App. 18a. In the majority's view, such gamesmanship is as "equally detrimental to public impressions of the judicial system as is a potentially biased judge." App. 18a (internal quotation marks and citation omitted).[4]

Having held that section 455(b)(2) includes a timeliness requirement, the Fourth Circuit majority concluded that Kolon did not raise recusal in a timely fashion, and refused to excuse the delay on the basis of DuPont's delayed disclosure of the full extent of the district judge's involvement. App. 20a-21a.[5] The majority then rejected Kolon's challenge to the district court's discovery rulings as being within the scope of the district court's "considerable discretion in

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[4] The Fourth Circuit also relied on its prior precedent of *United States v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990), which spoke generally about 28 U.S.C. § 455's requirements, and extended that precedent, which imposed a timeliness requirement, to section 455(b) as well as section 455(a). *See* App. 14a-16a.

[5] Having resolved the question on the timeliness grounds, the majority did not address the district court's alternative ruling that recusal was not required on the merits. App. 22a n.10.

overseeing discovery," and affirmed the grant of summary judgment. *See* App. 22a-36a.

Judge Shedd dissented from "the majority's unwarranted imposition of a timeliness requirement." App. 37a (Shedd, J., dissenting). Judge Shedd noted that the majority's statutory construction "constitutes the addition of words to the statute." App. 40a. "The statutory language of § 455(b) could not be plainer; it sets forth no procedural requirements. Congress' omission of any reference to a timely-filed motion as a prerequisite to § 455(b) recusal should end our inquiry." App. 41a (Shedd, J., dissenting) (internal quotations marks and citations omitted). Judge Shedd rejected the majority's reliance on the absurdity canon. *See* App. 40a-41a n.2 (Shedd, J., dissenting). Given the statutory objective of "'promot[ing] public confidence in the integrity of the judicial process,'" it was "entirely plausible that Congress did not intend to impose a timely-filing requirement." App. 40a-43a & n.2 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)).

The dissent saw additional support for its construction of section 455(b)(2) in the statutory context. First, "§ 455(e) provides that mandatory recusals may not be waived by the parties," and "the non-waiver of § 455(b) recusals reinforces the mandatory nature of the section." App. 42a. Second, Congress "respon[ded] to judicial economy concerns" by permitting a judge who must otherwise recuse himself due to "a financial conflict of interest under section 455 (b)(4)" to remain in the case by "'divest[ing] himself … of the interest.'" App. 42a-43a (quoting 28 U.S.C. § 455(f)). The fact that "Congress

spoke specifically to this one area" suggests that Congress did not intend to imply similar exceptions with respect to the other provisions of section 455(b). App. 43a.

Judge Shedd also observed that "a timely-filing requirement subverts the statute's intent." App. 43a. The recusal statute "is based upon the notion that, when the judge has information that triggers one of the subsections of § 455(b), that judge will recuse himself or herself regardless of any urging by a party." App. 44a. The timeliness requirement, by contrast, "pivots responsibility from the judges to the litigants," undermining the statutory goal of ensuring public confidence in the judiciary's integrity. App. 44a.[6]

Judge Shedd would have held that recusal was required because the *Akzo* litigation was a matter in controversy. App. 50a-51a. He would have vacated the district court's grant of summary judgment and remanded the case to a different district judge. App. 51a.

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[6] To the extent timeliness should play a role in recusal, Judge Shedd agreed with the Federal Circuit that it is a potential equitable factor that may limit relief "where a party learns of information that the judge does not (or may not) possess but then sits on that information as a litigation strategy." App. 45a (Shedd, J., dissenting) (discussing *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1419 (Fed. Cir. 1989)). Under such a rule, Judge Shedd would have concluded that Kolon acted timely because "DuPont impeded the discovery of *Akzo* documents" and "did not highlight the district judge's role in the prior litigation," and "at all times the district court was aware that Kolon was pursuing discovery of the *Akzo* litigation." App. 46a (Shedd, J., dissenting).

In Kolon's separate appeal of the trade-secret judgment, decided on the same day, the Fourth Circuit likewise ruled (in reliance on this case) that the district judge did not have a duty to disqualify himself under section 455(b)(2) because Kolon had failed to file a timely motion. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, Nos. 12-1260 & 12-2070, 2014 WL 1317700, *6 (4th Cir., Apr. 3, 2014). Nonetheless, the Fourth Circuit vacated the jury verdict on other grounds, and granted Kolon's motion for a new trial. *Id.* at *3-*6. Despite having found recusal barred by the absence of a timely motion by Kolon, the Fourth Circuit deemed "it prudent to direct, pursuant to our supervisory powers under 28 U.S.C. § 2106, that all further proceedings on remand be conducted before a different district judge." *Id.* at *6.

F. Stay of the Mandate.

On May 23, 2014, in recognition of the significant questions posed for this Court's ruling, the Fourth Circuit stayed its mandate in this case pending the filing of a petition for a writ of certiorari from this Court. App. 90a. *See* Fed. R. App. P. 41(d)(2)(A) (permitting a court of appeals to stay its mandate where "the certiorari petition would present a substantial question" for this Court's review).

G. Pending Sanctions Motions.

Although the Fourth Circuit affirmed the final judgment on the antitrust counterclaim, two sanctions motions brought by DuPont against Kolon remain pending in the district court before the judge whose disqualification is at issue.

REASONS FOR GRANTING THE PETITION

A divided United States Court of Appeals for the Fourth Circuit held below, over a strong dissent, that a timely party motion is a condition precedent to a federal judge's performance of his statutory duty to disqualify himself when he or any of his former law partners have served as a lawyer in the matter in controversy. This Court should resolve the circuit conflict on this important question of law, which the Fourth Circuit acknowledged as a 7-2 split, and is in fact 8-3. Moreover, the Fourth Circuit acknowledged that its ruling had no foundation in the statutory text, and had to resort to the absurdity canon as justification for rewriting the statute, App. 16a (citing *United States v. Ron Pair Enters.,* 489 U.S. at 242) — even though the contrary interpretation of the dissent and the Federal Circuit fully addresses the equitable concerns raised by the majority opinion. This Court should vindicate the text and important statutory policies of 28 U.S.C. § 455 by reversing the judgment below.

I. This Court Should Resolve a Deep Circuit Split over Whether a Timely Party Motion Is a Condition Precedent for Disqualification of a Judge.

Section 455 of Title 28 defines rules for the mandatory disqualification of federal judges. Subsection 455(a) provides that "[a]ny justice, judge, or magistrate of the United States *shall disqualify* himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). Subsection 455(b) sets forth five actual conflicts of interest in which Congress has deemed the judge's relationship to, or interest in, the

matter or the parties or their counsel to mandate disqualification, without need for a specific determination of whether the judge's impartiality might be questioned. *Id.* § 455(b)(1)-(5). Relevant here is subparagraph 455(b)(2), which provides in mandatory and unqualified language that the judge

> *shall* also *disqualify* himself … [w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it … .

Id. § 455(b)(2) (emphasis added).

No part of section 455 places any obligation, substantive or procedural, upon the parties to an action over which the judge presides. Instead, Congress "placed the obligation to identify the existence of [disqualification] grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit." *Liteky v. United States*, 510 U.S. 540, 548 (1994).

The subsections of section 455 reflect the judge's independent duty of self-disqualification. Subsection (c) provides that "[a] judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." 28 U.S.C. § 455(c). Subsection (e) authorizes the parties to waive disqualification arising only from subsection (a), but provides that "[n]o justice, judge, or magistrate judge shall accept from the parties to the

proceeding a waiver of any ground for disqualification enumerated in subsection (b)." *Id.* § 455(e). By providing that subsection (b) disqualification cannot be waived, subsection (e) "creates what is tantamount to a 'jurisdictional' limitation on the authority of a judge to participate in a given case." *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988). Finally, subsection (f) addresses the lone circumstance in which disqualification may not be required "after substantial judicial time has been devoted to the matter": namely, when the judge discovers a disqualifying financial interest after the matter has been assigned to him or her, and the judge "divests himself or herself of the interest that provides the grounds for the disqualification." 28 U.S.C. § 455(f).

Notwithstanding the plain and mandatory language of subsection 455(b), the statutory bar on party waiver in subsection (e), and the limited circumstance in which the time the judge devoted to a matter is relevant to disqualification in subsection (f), a deep circuit split has emerged on the question of whether a judicially implied requirement of a timely party motion should be imposed as a condition precedent to mandatory statutory disqualification. As the Fourth Circuit acknowledged below, six of its "sister circuits have … found a timely filing requirement to be implied despite the text's silence." App. 17a (citing *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 789-91 (8th Cir. 2009) (§ 455(a) and (b)); *Omega Eng'g, Inc. v. Omega*, S.A., 432 F.3d 437, 447-48 (2d Cir. 2005) (§ 455(b)); *Stone Hedge Props. v. Phoenix Capital Corp.,* 71 Fed. App'x 138, 141 (3d Cir. 2003) (unpublished) (§ 455(b)); *United States v. Rogers*, 119 F.3d 1377, 1380-83 (9th Cir. 1997) (§ 455(a) and (b)); *Summers v. Singletary*, 119 F.3d

917, 920-21 (11th Cir. 1997) (§ 455(b)); *United States v. York*, 888 F.2d 1050, 1053-55 (5th Cir. 1989) (§ 455(a) and (b))). In addition, the Tenth Circuit has recognized a timely requirement under subsections 455(a) and (b). *Willner v. Univ. of Kan.*, 848 F.2d 1020, 1022-23 (10th Cir. 1988).

By contrast, the Fourth Circuit acknowledged, "two circuits have refused to read in a timeliness requirement." App. 17a. In *SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977), the Seventh Circuit unequivocally held that "there is no basis in law" for finding that disqualification can be denied because a party did not timely move for it. *Id.* at 117. Noting the interplay of subsection 455(b) and (e), the Court observed:

> The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed "that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Moreover, although the Department of Justice recommended that the new section 455 should include some limitation of time "to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before," (H.R. Rep.

> No. 1453, 93d Cong., 2d Sess. 9 (1974) U.S. Code Cong. & Admin. News, 1974, p. 6358), Congress did not incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit.

Id. (footnote omitted). Although as the majority below pointed out, one Seventh Circuit judge has criticized *SCA* and a panel of that Circuit noted that its precedent is contrary to the majority rule, *see* App. 17a, *SCA* states the law in the Seventh Circuit and has stood for 37 years.

Similarly, the Federal Circuit has rejected an implication of a timing requirement in section 455(b). *See Polaroid Corp. v. Eastman Kodak Co.,* 867 F.2d 1415, 1418 (Fed. Cir. 1989). The Federal Circuit held:

> Application of a "timeliness" requirement requires a fixed point or bench mark from which the timeliness or untimeliness of an action can be measured (*e.g.*, 10 days after event X; before event Y). There is no such provision anywhere in section 455. Nor could there be. The statute deals only with action of a judge. It has nothing to do with actions of counsel.

Id. The Federal Circuit acknowledged the policy against gamesmanship that the courts of appeals have sought to vindicate with implied timeliness requirements, but characterized timeliness as one factor in determining what equitable relief should be

rendered in vacating the orders of a disqualified judge. *Id.* at 1418-19. The majority opinion below mischaracterizes *Polaroid* as establishing "a de facto filing obligation under principles of equity." App. 17a-18a. The Federal Circuit explicitly rejected the validity of any concept of timely filing, and expressly held that "[t]he passage of time is merely one factor and events preceding the motion require equal if not greater consideration. Thus the concept of 'timeliness' merges into and is subsumed in the concepts of 'equity,' 'fairness,' and 'justice.'" *Polaroid*, 867 F.2d at 1418-19.[7]

Finally, the Sixth Circuit has adopted the minority rule. In *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980), the Sixth Circuit held that recusal was not required under a separate statute, 28 U.S.C. § 144, because the plaintiff had failed to submit the required timely affidavit from a party alleging personal bias of the judge. But the Sixth Circuit held that this procedural defect was not fatal under section 455(a):

> The District Judge had an independent duty to recuse himself, however, under 28 U.S.C. § 455(a). Section 455(a) is a self-executing provision for the disqualification of federal judges. There

[7] *Polaroid* was a patent case arising from a district court in the First Circuit, in which the Federal Circuit attempted to "follow the guidance" of First Circuit law on the non-patent law of disqualification. *Id.* at 1419 n.11. The Federal Circuit later recognized *Polaroid* as circuit precedent in a matter within its exclusive jurisdiction (involving an appeal from the U.S. Court of Federal Claims). *Shell Oil Co. v. United States*, 672 F.3d 1283, 1288, 1293 (Fed. Cir. 2012) ("In light of our decision in *Polaroid*, violations of § 455(b) can constitute harmless error.").

> is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, the section sets forth a mandatory guideline that federal judges must observe *sua sponte*.

Roberts, 625 F.2d at 128 (internal footnotes omitted). The Sixth Circuit observed that nothing in the text or history of section 455 suggested adoption of the procedures of section 144; expressly approving the analysis of the Seventh Circuit in *SCA*, the court declared that "Congress disregarded suggestions that requirements such as timeliness apply to disqualification under § 455." *Id.* at 128 n.8.

In a subsequent case involving allegations of appearance of impropriety under section 455(a) and personal bias under section 455(b), the Sixth Circuit declared that timeliness is implicitly required, not as a condition precedent to disqualification, but rather as "a factor that obviously merits consideration by a court that is trying to determine whether a judge is truly biased or a litigant is merely trying to avoid an impending adverse decision." *In re City of Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987). Since the *ratio decidendi* of *Roberts* rejects any claim of party procedural obligations under section 455, including timeliness, the circuit split is more appropriately regarded as 8-3.

Recently, a respected jurist, Judge Stephen Williams of the D.C. Circuit, has criticized the judicial implication of a timeliness requirement in section 455. In *United States v. Brice*, 748 F.3d 1288 (D.C. Cir. 2014), the majority had refused to consider a claim that the district judge should have recused

himself under section 455, in part based on circuit precedent that "if the motion is not filed in a reasonable time, the objection is deemed waived and may not be considered on appeal." *Id.* at 1289. Although bound by precedent, Judge Williams found the timeliness rule antithetical to the plain language; "the language of § 455(e) on its face made the values protected by § 455(b) trumps over judicial economy," and the rule creates "an apparent anomaly: while recognizing that *deliberate* waiver of § 455(b) values is impossible, it allows an easy loss of those values through mere neglect." *Id.* at 1292-93 (Williams, J., concurring in the judgment). Judge Williams also found the timeliness bar nonsensical because it prevented consideration of a forfeited issue that could ordinarily be reviewed for plain error. *Id.* at 1294-95.

For the foregoing reasons, this Court should grant the petition to resolve the significant conflict of authority among the courts of appeals on an important federal statute.

II. This Court Should Reverse the Fourth Circuit's Rewriting of an Important Federal Statute.

Even apart from the circuit conflict identified above, a lower court's attempt to rewrite a federal statute presents "an important question of federal law that has not been, but should be, settled by this Court," and thus warrants certiorari. Sup. Ct. R. 10(c). That is especially so when the statute at issue is designed to "promote public confidence in the integrity of the judicial process," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988), and when the decision below is manifestly wrong. Contrary to the majority opinion, there is no

absurdity whatsoever in giving section 455 its plain meaning by enforcing the independent duty of the judge to disqualify himself regardless of whether a party brings a disqualification motion. All of the policy concerns that moved the Fourth Circuit — namely, concerns about not rewarding strategic conduct by dilatory parties — may be addressed by implementing section 455 according to its mandatory terms, and then applying equitable principles in deciding what orders rendered by the disqualified judge should be vacated. *Polaroid*, 867 F.2d at 1418-19; *Liljeberg*, 486 U.S. at 862 (noting that federal judges shall fashion the appropriate remedies for violations of section 455).

A. The Plain Language of the Statute Makes Disqualification Mandatory Without Regard to a Party Motion.

"[W]hen the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

As Judge Shedd observed in dissent, "[t]he statutory language of § 455(b) could not be plainer; it sets forth no procedural requirements. Congress' omission of any reference to a timely-filed motion as a prerequisite to § 455(b) recusal should end our inquiry." App. 41a (internal quotations marks and citations omitted). The statutory provisions "impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought." *SCA*, 557 F.2d at

117; *Roberts*, 625 F.2d at 128 & n.8. Moreover, as the Federal Circuit has observed, it is impossible to derive a timeliness requirement in the absence of any benchmarks for required action. *Polaroid,* 867 F.2d at 1418. Congress's decision not to impose procedural duties upon parties is unsurprising: "The statute deals only with action of a judge. It has nothing to do with actions of counsel." *Id.*

The surrounding provisions of the statute confirm that the judge's duty of self-disqualification is not contingent upon a timely party motion. First, "§ 455(e) provides that mandatory recusals may not be waived by the parties," and "the non-waiver of § 455(b) recusals reinforces the mandatory nature of the section." App. 42a (Shedd, J., dissenting). Second, the grounds for recusal under subsection (b) — such as financial interests or participation in the matter in controversy as a lawyer — are items within the independent knowledge of the district judge, who does not need a party motion to be informed of the relevant facts. Indeed, the statute enjoins the district judge to "inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." 28 U.S.C. 455(c). Third, Congress has addressed concerns of timeliness in a much more limited fashion in subsection 455(f). Congress there "respon[ded] to judicial economy concerns" by permitting a judge who must otherwise recuse himself due to "a financial conflict of interest under section 455 (b)(4)," but who has devoted substantial judicial time to the matter, to remain in the case by "'divest[ing] himself … of the interest.'" App. 42a-43a (Shedd, J., dissenting) (quoting 28 U.S.C. § 455(f)).

The fact that "Congress spoke specifically to this one area" suggests that Congress did not intend to imply similar exceptions with respect to the other provisions of section 455(b). App. 43a (Shedd, J., dissenting). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

The Fourth Circuit made no pretense that it derived its rule from *interpretation* of the text of section 455; it effectively rewrote the statute to require a timely party motion because it deemed section 455 one of "'the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" App. 16a (quoting *Ron Pair Enters.,* 489 U.S. at 242).

Judicial rewriting of a federal statute is strongly disfavored. *See, e.g.*, *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010) ("The manner in which the law could have been written has no bearing; what matters is the law the Legislature did enact. We cannot rewrite that to reflect our perception of legislative purpose.") (citations omitted); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."); *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

This is not a case where Congress's intent to make disqualification contingent upon a timely party motion was abundantly clear from the legislative history, and a federal court is merely correcting an

overt error or omission in the drafting; indeed, as shown below, the legislative history supports Petitioner. Nor did the Fourth Circuit have cause to invoke the doctrine against interpreting a statute to avoid absurd results. As Judge Shedd noted in dissent, "[t]he hurdle for invoking the [absurdity] canon is … 'a very high one'" because it presents the danger of "'judicial revision of public and private texts to make them (in the judges' view) more reasonable.'" App. 40a-41a n.2 (Shedd, J., dissenting) (quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012)).

That hurdle is not cleared here. The Fourth Circuit's imposition of a judicially crafted timely-filing requirement subverts rather than furthers congressional intent. App. 43a (Shedd, J., dissenting). Section 455 serves to "promote public confidence in the integrity of the judicial process." *Liljeberg,* 486 U.S. at 858 n.7. It defeats public confidence in the judiciary for a judge whose disqualification is mandatory to continue to serve simply because a party does not raise the issue soon enough: "The timely filing requirement, as implemented by the majority, pivots responsibility from the judges to the litigants when that duty and responsibility should lie with us." App. 44a (Shedd, J., dissenting).

The Fourth Circuit, like the other courts in its camp, has arrogated to itself the right to make legislative policy judgments on proper disqualification procedure. It has not only determined that a timely party motion is a condition precedent to disqualification, even where Congress

has declared disqualification to be mandatory. It has also declared, without any guidance from Congress, what shall constitute timeliness, adopting the stringent rule that a party must raise disqualification "at the earliest moment after [its] knowledge of the facts." App. 19a-20a (alteration in original) (internal quotation marks omitted); *see also* App. 48a (Shedd, J., dissenting) (criticizing the majority's approach). And it has determined that a party must not only raise the issue to the judge, but must file a formal motion to disqualify. App. 20a; *see also* 41-42a n.3 (Shedd, J., dissenting) (criticizing the majority's requirement of a formal motion). It is not the role of the judiciary to fashion procedural requirements according to its conceptions of proper policy, when Congress has not done so.

The Fourth Circuit's concerns about a party's "knowing concealment of an ethical issue for strategic purposes," App. 15a (internal quotation marks omitted), do not justify a judicial rewriting of the statute. As an initial matter, as Judge Shedd pointed out, those concerns only arise when "where a party learns of information that the judge does not (or may not) possess but then sits on that information as a litigation strategy." App. 45a (Shedd, J., dissenting). No such circumstance is present here. Kolon did not have superior or earlier knowledge of the relevant facts vis-à-vis DuPont or the district judge, and it was DuPont that acted inequitably in first impeding discovery of the *Akzo* documents and then concealing the district judge's personal involvement in that litigation. App. 37a-38a, 46a (Shedd, J., dissenting). As Judge Shedd observed, "DuPont impeded the discovery of *Akzo* documents" and not only "did not highlight the district judge's rule in the prior

litigation," either to Kolon or to the district court, but attempted to bury that involvement in "voluminous discovery" and to shield it by a groundless claim of privilege. App. 46a (Shedd, J., dissenting); *see also* App. 8a-9a; *supra* at 6-7.

Nor is there any basis for an inference that Kolon lay in wait in the hope of receiving favorable rulings. The district judge had consistently ruled against Kolon on every significant motion in the case from its inception. For example, the court granted DuPont broad discovery beyond the allegations in its trade-secrets complaint. It denied Kolon's motion to dismiss DuPont's complaint, and granted a motion by third-party defendants to dismiss Kolon's complaint against them. It repeatedly denied Kolon's motions requesting DuPont to specify its trade secrets. It granted DuPont's spoliation sanction motion, and denied Kolon's, even though the latter was far more justified. The district court granted all of DuPont's motions in limine, while denying all of Kolon's motions in limine.

More importantly, any concerns about "tactical sandbagging" by parties, App. 19a, can be fully accommodated without departing from the plain language of the statute and relieving the district judge of his or her mandatory duty of self-disqualification. As this Court has stated, "[a]lthough § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Liljeberg*, 486 U.S. at 862. Courts can consider

timeliness as an equitable factor in determining whether to grant relief. *Polaroid*, 867 F.2d at 1418-19. A party cannot profit from sandbagging (*i.e.*, from withholding facts giving rise to disqualification to see if it prevails, and then seeking to undo any unfavorable rulings by later claiming disqualification) if a court refuses on equitable grounds to vacate any order that was issued prior to a party's notice to the district court of the grounds of disqualification. Given that a court can always punish inequitable party conduct in fashioning relief, where circumstances warrant, the Fourth Circuit had no cause to rewrite the statute that mandates disqualification of the judge without exception. A judge should never continue to preside over a case where Congress has mandated his recusal.

B. Section 455 Stands in Contrast to Disqualification Statutes that Place Procedural Burdens upon Parties.

Congress's choice to impose a mandatory duty of disqualification upon federal judges, independent of any motion by the party, must be regarded as a conscious one. Other disqualification statutes, past and present, have placed procedural burdens on parties. For example, an early version of the federal disqualification statute, in effect for more than a century, provided for disqualification on "application" of a party. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. Similarly, 28 U.S.C. § 144 — which requires automatic disqualification of a district judge — explicitly makes such disqualification contingent upon a party action:

> Whenever a party to any proceeding in a district court makes and files a timely

> and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144. These statutes demonstrate that, if Congress intended to make disqualification contingent on a timely party motion, "it knew how to do so." *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Congress's decision in section 455 to place the burden of determining disqualification on the federal judge, and not on the parties, must be honored.

C. The Legislative History of Section 455, and the Judicial Canons of Ethics that the Statute Codifies, Reveal the Error of the Court Below.

The legislative history of the statute confirms the plain meaning of the statutory text. Section 455 "was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1987)." *Liljeberg*, 486 U.S. at 858 n.7 (citing S. Rep. No. 93-419, at1 (1973); H.R. Rep. No. 93-1453, at1-2 (1974)). Congress did not want judges to be faced with "dual standards" under the ABA Canons and section 455, and so decided to "make both the statutory and the ethical standard virtually identical" by importing ABA Canon 3C into the statute. H.R. Rep. No. 93-1453, at 3. And, indeed, the grounds of mandatory disqualification in section 455(b) are exactly the same as those found in Canon

3C, save that Congress added subsection 455(b)(3) relating to judges who previously served as government lawyers. *Id.* at 4-6. The statutory provision at issue here, mandating disqualification where the judge "served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter," 28 U.S.C. § 455(b)(2), replicates almost verbatim Canon 3C(1)(b) of the Code of Conduct for United States Judges (which adopted the ABA standards).

Federal judges are solely responsible for complying with the ethical canons of the Code of Conduct, and the judge's fulfillment of his or her ethical duty does not depend on the existence of a party motion. Indeed, the commentary to Rule 2.11 of the current ABA Model Code of Judicial Conduct (which corresponds to Canon 3C) explicitly states that "[a] judge's obligation not to hear or decide matters in which disqualification is required applies *regardless of whether a motion to disqualify is filed*." Comment on Rule 2.11, ABA Model Code of Judicial Conduct (emphasis added), *available at http://www.americanbar.org/groups/ professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification/commentonrule2_11.html* (last visited July 18, 2014). Furthermore, the federal judiciary's rules and regulations provide that "[i]f a judge fails to remove herself from hearing a case when necessary, she may be subject to judicial complaint, investigation, and corrective measures." Rules and Regulations for the U.S. Judiciary, Judicial Conduct and Discipline, *available at http://www.fjc.gov/public/pdf.nsf/ lookup/IJR00053.pdf/*

$file/IJR00053.pdf (last visited July 18, 2014). It simply makes no sense to adopt a statutory construction that allows a judge to continue to preside over a case when it is unethical and even sanctionable for him to do so.

Moreover, Congress specifically considered a proposal to amend section 455 to include the requirement of a timely motion, and did not adopt it. The Department of Justice wrote a letter to Congress suggesting that "consideration should be given to adding a provision such as is embodied in 28 U.S.C. 144 to assure that applications for disqualification shall be timely made so as to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before." Letter of W. Vincent Rakestraw, Assistant Attorney General, Department of Justice, to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C. (April 4, 1974), *reproduced in* H.R. Rep. No. 93-1453, at 9. When the Department of Justice asks for an amendment to the bill to require a timely motion, and Congress does not adopt the suggestion, courts should not step into the breach. Where Congress considered, and rejected, a specific legislative proposal, a court may not "disregard the legislative history" and "distort" the statutory definition "to reach what it believes to be an 'equitable' result." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 717-20 (1982); *see also Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) ("It is quite unlikely that the same Congress

that rejected [specific legislative] proposals … sought to accomplish that very purpose *sub silentio* … .").[8]

Finally, the Fourth Circuit's rule, by requiring parties to be adverse to the district judge in demanding his disqualification, is contrary to the intent of Congress. One area where Congress chose to depart from the ABA Canons was on the question of waiver. Whereas the ABA Canons had permitted party waivers, Congress instead chose in section 455(e) to forbid any waiver of the disqualification grounds set forth in subsection 455(b). *See* H.R. Rep. No. 93-1453, at 7. The legal scholar who advised the Senate to adopt this provision explained that "[t]he practicalities of life are that waiver can be a kind of a velvet blackjack in which the lawyer who is going to appear before the same judge at another time in another case really has very little choice." *S. 1064, Judicial Disqualification, Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary,* 93rd Cong. 13 (1974) (Statement of John P. Frank). Indeed, the Judicial Conference of the

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[8] The Fourth Circuit unconvincingly claimed that the legislative history is "murky" because, it argued, Congress may have ratified the construction of some courts of the prior version of section 455 as requiring a timely motion. App. 16a-17a n.7. But there was no such single construction that Congress could be deemed to ratify; there was a circuit split over whether a timely-filing rule should be implied under the prior statute. *See United States v. Barry*, 528 F.2d 1094, 1097 n.7 (7th Cir. 1976) (collecting cases); *United States v. Amerine*, 411 F.2d 1130, 1134 (6th Cir. 1969). Moreover, section 455 was completely rewritten in 1974, and "the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change." *Holder v. Martinez-Gutierrez*, 132 S. Ct. 2011, 2018 (2012).

United States has resolved that federal judges who are deciding whether to disqualify themselves should not even approach party counsel for their opinions, for "'asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.'" Judicial Conference, Resolution L, *quoted in* 13D Charles Wright et al., FEDERAL PRACTICE & PROCEDURE § 3550, at 126 n.14 (3d ed. 2008). *A fortiori*, it is unduly coercive and unfair to require party counsel to move to disqualify a judge, especially where the judge is fully apprised of the facts that give rise to disqualification.

Congress therefore had good reason to "place[] the obligation to identify the existence of [disqualification] grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit." *Liteky*, 510 U.S. at 548. The Fourth Circuit should not have rewritten section 455 according to its policy views on proper disqualification procedure.

III. This Case Is the Perfect Vehicle for the Court To Review the Question Presented.

This case is the perfect vehicle for this Court to resolve the important federal questions upon which the courts of appeals are divided. First, this case arises under subsection 455(b), but the Fourth Circuit was explicit that the same requirement of a timely party motion applied under subsection 455(a) as well. App. 14a; 19a (citing *Owens*, 902 F.2d at 1156). Therefore, this Court may choose at its option to address only subsection 455(b), or announce a rule that applies to all of section 455. Second, the Fourth Circuit disposed of the recusal issue solely on the

basis of the timeliness issue; other questions of interpretation of section 455 are not presented to this Court, and thus there is no risk of a fractured opinion in this single-issue case. The question of whether judges should be permitted to continue to preside over cases even where Congress has mandated their disqualification is critical to public confidence in the judiciary. This Court should grant review to resolve the split of authority that has developed on this important issue of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

KOLON INDUSTRIES INCORPORATED,

Plaintiff–Appellant,

v.

E.I. DUPONT DE NEMOURS & COMPANY,

Defendant–Appellee.

No. 12–1587.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert E. Payne, Senior District Judge.
(3:11-cv-00622-REP)

Argued: May 17, 2013.

Decided: April 3, 2014.

Before SHEDD and DIAZ, Circuit Judges, and DAVIS, Senior Circuit Judge.

Affirmed by published opinion. Judge DIAZ wrote the opinion, in which Senior Judge DAVIS joined. Judge SHEDD wrote a dissenting opinion.

ARGUED: Stephen Blake Kinnaird, Paul Hastings LLP, Washington, D.C., for Appellant. Kent A. Gardiner, Crowell & Moring, LLP, Washington, D.C., for Appellee.

ON BRIEF: Daniel B. Goldman, Paul Hastings LLP, New York, New York; Jeff G. Randall, Igor V. Timofeyev, Samer M. Musallam, Paul Hastings LLP, Washington, D.C., for Appellant. David D. Cross, Jeffrey L. Poston, Crowell & Moring, LLP, Washington, D.C.; Adam H. Charnes, Kilpatrick Townsend & Stockton LLP, Winston–Salem, North Carolina, for Appellee.

OPINION

DIAZ, Circuit Judge:

In this Sherman Act case, we review the district court's grant of summary judgment in favor of Defendant–Appellee E.I. Du Pont de Nemours and Company ("DuPont"). We also consider challenges by Plaintiff–Appellant Kolon Industries Incorporated ("Kolon") to certain of the district court's discovery rulings and its denial of Kolon's recusal motion. Finding no reversible error, we affirm.

I.

A.

The merits of this case concern Kolon's claim that DuPont attempted to wield, or did wield, monopoly power over the U.S. para-aramid fiber market in violation of Section 2 of the Sherman Act, 15 U.S.C.

§ 2.[1] Para-aramid is a strong, complex synthetic fiber used in body armor, tires, fiber optic cables, and a variety of other industrial products. Three para-aramid producers—DuPont, Teijin Aramid (formerly a division of the Dutch company Akzo N.V.), and Kolon—sell their para-aramid fibers to U.S. consumers.

DuPont invented para-aramid fiber in 1965, and for a period controlled the entire U.S. para-aramid market with its Kevlar© fiber. Teijin introduced its competing Twaron© fiber to the U.S. market in 1987 and has chipped away at DuPont's share of that market every year since 1990. According to one of Kolon's expert witnesses, during 2006–2009 (the relevant time period), DuPont's share of the U.S. para-aramid market (the relevant geographic and product markets) fell from a high of 59% in 2006 to 55% in 2009, with most of this loss going to Teijin.

The U.S. para-aramid market is highly concentrated between DuPont and Teijin, which together account for 99% of U.S. sales. This extreme market concentration owes at least in part to the industry's high entry barriers. As Kolon showed, para-aramid production is time-intensive and expensive, and potential customers test and "qualify" each para-aramid product to ensure it meets their particular needs, a process that typically takes six months to three years. In addition to this evidence of

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[1] We recite the relevant facts in the light most favorable to Kolon. In so doing, we have done our best to honor the parties' oft-overzealous desires to keep certain purportedly sensitive information under seal. However, to the extent the district court has already disclosed (without objection) such in-formation, we treat it as public knowledge.

market concentration and high barriers to entry, Kolon adduced evidence that DuPont, despite Teijin's encroachment, earned profit margins of as high as 75% between 1997 and 2005 and had the ability to price discriminate among its customers.

Kolon made its foray into the U.S. para-aramid market in 2005 with its Heracron© fiber. Kolon's evidence showed that DuPont considered Kolon's market entry to be a threat. Anticipating Kolon's potential encroachment, DuPont began identifying segments of the market that it viewed as hospitable to entry, including auto short fibers (pulp for brakes and gaskets), tires, manufactured rubber goods, and fiber optic cables. According to Kolon, DuPont then undertook a strategy of executing multi-year supply agreements with high-volume customers in each identified segment, requiring these customers to purchase most or all of their para-aramid requirements from DuPont during the relevant time period.

These supply contracts contained restrictions, such as volume purchase commitments and "meet and release" clauses, that required any competing para-aramid seller to propose a bid at a designated lower amount than DuPont's existing price, prohibited the customer from informing the competing seller of DuPont's price, and gave DuPont a right to match any competing offer. As a result of these allegedly anticompetitive practices, Kolon insists, it never achieved more than a de minimis market share during the relevant time period. By contrast, Kolon was able to penetrate other comparable para-aramid markets, such as Europe.

DuPont, for its part, attributes Kolon's failure to penetrate the U.S. market to Kolon's own shortcomings. According to DuPont, Kolon undertook only a "feeble effort" to establish a U.S. foothold, using only seven sales agents, inadequately investing in product offerings and supply capacity, and contacting only a small percentage of potential customers as of October 2009. Meanwhile, DuPont defends its supply agreements as a competitive response to Teijin's use of such practices, and as driven by consumer demands.

DuPont also attempts to diminish the reach of its supply agreements, noting that it entered into only twenty-five agreements with twenty-one U.S. customers, collectively accounting for only a small percentage of its U.S. revenue. Of those agreements, DuPont says, only a portion obligated the customer to purchase some amount of Kevlar, and these had typical durations of two years or shorter. Meanwhile, none of DuPont's supply agreements precluded competitors from qualifying their products with the customer while the DuPont agreement was in effect. And of the group of "key" customers Kolon identified as necessary to establish a foothold for effective competition, DuPont notes that the majority had no supply agreement with DuPont during the relevant period. Appellee's Br. at 38. In short, DuPont submits that myriad self-inflicted failures—not DuPont's supply agreements—frustrated Kolon's U.S. market penetration.

B.

DuPont brought suit against Kolon alleging the theft and misappropriation of its Kevlar trade secrets (the "trade secrets case"). Kolon's answer included the instant counterclaim (the "antitrust case"), alleging

that DuPont had illegally monopolized and attempted to monopolize the U.S. para-aramid market through its supply agreements with high-volume para-aramid customers. DuPont moved, under Federal Rule of Civil Procedure 12(b)(6), to dismiss Kolon's counterclaim. The district court granted that motion, with leave to amend. Kolon filed an amended counterclaim, followed by a second amended counterclaim, which was also dismissed for failure to state a claim, again with leave to amend. Kolon declined to further amend the counterclaim, opting instead to appeal the dismissal. We reversed, holding that Kolon had adequately pleaded both its actual and attempted monopoly claims, and remanded the matter to the district court for further proceedings. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc. (DuPont I)*, 637 F.3d 435 (4th Cir. 2011).

On remand, the district court tried the trade secrets claim separately, culminating in a $919.9 million jury verdict for DuPont on September 14, 2011. The court then formally severed the two claims. The court also issued several rulings adverse to Kolon in the antitrust case. First, the district court denied Kolon's motions to compel DuPont's production of transaction-level sales and cost data, concluding that this discovery would significantly burden DuPont and would not be any more useful than the aggregate sales and cost data DuPont had already produced. The district court also denied Kolon's motions—filed on grounds described below—for recusal and disqualification in both the antitrust and trade secrets cases. The district court further denied Kolon's request to depose a DuPont corporate representative concerning its strategic use of supply agreements. Finally, the district court granted summary judgment

to DuPont on both Sherman Act claims, dismissing them with prejudice. Kolon timely noted this appeal.

II.

Before turning to the merits of the antitrust claims, we first consider Kolon's argument that the district court judge was required to recuse himself in both the instant antitrust case and the trade secrets case, which is also now before us on appeal. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, No. 12–1260 (argued May 17, 2013).

A.

Kolon's recusal motion is based on the district court judge's involvement, while in private practice, in litigation that, according to Kolon, presents a matter in controversy in the instant dispute. In the 1980s, DuPont and Akzo N.V., Teijin's predecessor, became embroiled in several patent lawsuits relating to the manufacture and sale of para-aramid fibers. In one such dispute, Akzo sued DuPont in the United States District Court for the Eastern District of Virginia for infringement of an Akzo para-aramid patent.

In the *Akzo* case, DuPont was defended by the law firms Fitzpatrick, Cella, Harper & Scinto ("Fitzpatrick Cella") and McGuire Woods & Battle (now "McGuireWoods"). In the 1980s and at the time of the *Akzo* case, the district court judge was a partner at McGuireWoods. As a result, he was a limited partner in an affiliated entity, and continued to receive small payments from McGuireWoods of rent for furnishings. Because McGuireWoods also served as counsel to DuPont in the present litigation, in May 2009 the clerk of court issued a notice informing the parties of the judge's related financial interest.

The judge noted then that he did not believe grounds for disqualification existed, but he instructed the parties to file a motion within 20 days if they believed otherwise. Neither party filed a motion or otherwise objected to the judge's continued participation in the case.

Kolon believed the *Akzo* matter was central to both its defense of the trade secrets case and its maintenance of the antitrust case. In the antitrust case, Kolon began seeking discovery of the *Akzo* case files in August 2009. It contended that the *Akzo* litigation—which also included a counterclaim filed by DuPont, and which was ultimately resolved pursuant to a settlement that restricted Akzo's exports to the United States—was relevant evidence of DuPont's anticompetitive practices and its intent to monopolize the U.S. para-aramid market.

In the trade secrets case, beginning in April 2010, Kolon conducted extensive discovery into the *Akzo* litigation on the theory that DuPont's asserted trade secrets had been revealed in the course of that litigation and therefore were no longer secret. In August 2010, the district court ordered McGuireWoods, DuPont, and Fitzpatrick Cella to review the *Akzo* case files and to produce responsive documents. Later that month, DuPont produced approximately thirty boxes of documents, along with a privilege log, from Fitzpatrick Cella's files.

One of the entries on the privilege log showed that in May 1985, Mr. Fitzpatrick of Fitzpatrick Cella had sent the district court judge, then a partner at McGuireWoods, a letter confirming a telephone conversation in which Fitzpatrick had asked the judge to send him a facsimile of the complaint filed by Akzo.

The privilege log also indicated that, per Mr. Fitzpatrick's request, the judge had faxed him a copy of the complaint.

Nearly a year later, on July 20, 2011, Kolon filed a memorandum opposing one of DuPont's proposed jury instructions in the trade secrets case. In that memorandum, Kolon stated that it was "compelled to point out that there is some question whether Your Honor should be adjudicating these matters [due to DuPont's production of documents] indicating a role by Your Honor in the earliest stage of the Akzo litigation." *Kolon Indus., Inc. v. E.I. du Pont de Nemours & Co.*, 846 F. Supp. 2d 515, 519 (E.D. Va. 2012) (quoting 3:09–cv–58, Docket No. 1247) (emphasis omitted). In a subsequent telephone conference with the court, Kolon's counsel explained that the source of its concern was the May 1985 letter from Mr. Fitzpatrick to the district court judge.

The district court judge then ordered DuPont to produce any documents concerning his involvement in the *Akzo* litigation, which ultimately comprised only the two documents described above: the May 1985 letter from Mr. Fitzpatrick to the judge requesting a copy of the *Akzo* Complaint, and the judge's responsive facsimile cover sheet, with the Complaint attached. Following further inquiry into the matter, Kolon's counsel represented that they had reviewed all the non-privileged documents from the Fitzpatrick Cella files and that none of those documents contained the judge's name; DuPont's counsel made similar representations with respect to the files' privileged documents.

After reviewing the two relevant documents, the district court judge determined that he had no

recollection of the communication with Fitzpatrick or of any involvement in the *Akzo* litigation. Kolon said nothing more then about the issue.

During these inquiries, the trade secrets trial began as scheduled, and the jury returned a $920 million dollar verdict for DuPont after a seven-week trial. Meanwhile, discovery in the antitrust case was underway following our March 2011 reversal of the district court's initial dismissal. As in the trade secrets case, the parties came to a head over Kolon's proposed discovery of the *Akzo* litigation files, and in September and October of 2011 filed reciprocal motions respectively seeking to compel and protect that information.

Then, on November 30, 2011, two months after the jury verdict in the trade secrets case, and two days before motions for summary judgment were due in the antitrust case, Kolon filed its recusal motion, which the district court denied.[2]

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[2] In its motion and supporting memorandum, Kolon also suggested that the district court "revisit its refusal to recuse" from the trade secrets case, apparently referring to the discussion of recusal in July. Docket No. 247, at 2; Docket No. 248, at 31. Kolon filed no separate motion for recusal in the trade secrets case at that time, but did briefly reference recusal in several subsequent filings. On December 9, 2011, Kolon filed a reply in support of its motion for a judgment as a matter of law; in a footnote, it reminded the court of its position that the judge should not have ruled regarding the adverse jury instructions. See Docket No. 1738, at 13. On December 23, Kolon asked the court to consider recusal in its memorandum supporting its motion to stay the injunction proceedings. See Docket No. 1813, at 19. And in its reply regarding that motion, on January 11, Kolon insisted that a formal motion for recusal was unnecessary. See Docket No. 1843, at 19 (responding to Docket No. 1830, at 26–27). During a January 2012 hearing on Kolon's motion for a

B.

28 U.S.C. § 455(b)(2), the provision on which Kolon relies, provides that any judge of the United States shall disqualify himself

> [w]here in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

28 U.S.C. § 455(a), which also has some relevance to our inquiry, provides that "[any judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[3]

The district court reasoned that although § 455 is itself silent on whether a party seeking recusal must timely file a motion with the court, and despite the mandatory text of § 455(b) ("[Any judge] ... shall disqualify himself...."), the majority of circuits,

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new trial and judgment as a matter of law in the trade secrets case, counsel for Kolon again requested that the district court judge recuse himself. The judge refused to do so, explaining that he did not have a recusal motion before him in that case. Three days later, on January 27, 2012, Kolon filed its motion for recusal and disqualification in the trade secrets case. The district court denied the recusal motions in both cases on February 21.

[3] A separate recusal statute, 28 U.S.C. § 144, provides parties with one opportunity per case to file an affidavit that the presiding judge has a personal bias or prejudice regarding a party. If the affidavit is sufficient, accompanied by a certificate of good faith, and timely filed, another judge will be assigned to the proceeding. Kolon did not seek recusal on this ground in the district court.

including this one, have found that § 455 includes a timeliness requirement. *Kolon Indus.,* 846 F. Supp. 2d at 522 (citing, *inter alia*, *United States v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990)). Accordingly, because Kolon had delayed in filing its recusal motion for almost a year after it learned of the alleged conflict, the district court denied Kolon's motion as untimely.

Ruling in the alternative on the merits, the district court concluded that even ignoring the untimeliness of Kolon's motion, recusal was unnecessary under § 455(b)(2) since the *Akzo* litigation was not "sufficiently related" to the instant action to "constitute parts of the same matter in controversy."[4] *Id.* at 528 (quoting *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998)).

C.

We review a judge's recusal decision for abuse of discretion. *United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989).

We first consider Kolon's challenge to the district court's holding that § 455(b)(2) includes a timely-filing requirement that Kolon failed to satisfy. Kolon maintains that the district court erred by relying on *Owens,* in which we said that "[t]imeliness is an essential element of a recusal motion," and that notwithstanding the absence of an explicit timely-filing requirement in § 455, such a requirement is "judicially implied." 902 F.2d at 1155.

This language, Kolon submits, does not control here because it speaks only "broadly about section 455

[4] Additionally, the district court held that recusal was unnecessary under § 455(a). Since Kolon does not appeal that ruling, we do not address it.

and did not specify whether this requirement should apply to both subsections (a) and (b) or solely to [sub]section 455(a)." Appellant's Br. at 58. In Kolon's view, *Owens* "more likely" involved a situation under § 455(a) in which the judge's "impartiality might [have] reasonably be[en] questioned," not a § 455(b)(1) scenario implicating "personal bias or prejudice."[5] *Id.* at 59. Accordingly, Kolon believes *Owens* merely resolved that a timely motion is required when recusal is implicated under § 455(a), leaving open that question with respect to § 455(b).

In Kolon's view, the § 455(a) and (b) provisions are different enough to explain the presence of a timeliness requirement in the former despite the absence of such in the latter. Unlike § 455(a), § 455(b) may not be waived by the parties. *See* 28 U.S.C. § 455(e) ("No [judge] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted...."). From Kolon's perspective, subsections 455(b) and (e) create a "jurisdictional limitation on the authority of a judge to participate in a given case," leaving the judge with a *sua sponte* obligation to recuse himself or herself when he or she knows the predicate facts implicating § 455(b). Appellant's Br. at 60 (quoting *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988) (internal quotation marks omitted)). Thus, Kolon continues, "requiring a timely party motion as a

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[5] 28 U.S.C. § 455(b)(1) requires a judge to recuse himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning [a] proceeding."

condition precedent to enforcing section 455(b) runs contrary to statutory design, effectively relieving the judge of his personal statutory duty." *Id.*

D.

While Kolon's arguments do not entirely lack merit, we conclude that § 455(b), like § 455(a), includes a timely-filing requirement under *Owens* and that Kolon failed to comply with it.

As the parties and the district court have acknowledged, the party seeking recusal in *Owens* did not specify which provision of § 455 required it, and we did not cabin our holding to any specific provision of that section. In *Owens,* the defendant, after publicly accusing the then-Governor of West Virginia of bribery, filed a motion for recusal based on the presiding judge's "long association" with the Governor, who was responsible for the judge's appointment to various offices. 902 F.2d at 1155.

In our view, these facts could plausibly fit under either of two subsections, 455(a) or 455(b)(1). On the one hand, the scenario in *Owens* could certainly speak to § 455(a)'s concern with situations where a judge's impartiality might reasonably be questioned. But on the other, as the district court here determined, the judge's perceived allegiance to the West Virginia Governor could reasonably have concerned "a personal bias or prejudice concerning" the defendant—the Governor's accuser—thus implicating § 455(b)(1). Given this ambiguity, we are left only with *Owens's* unqualified announcement that "[t]imeliness is an essential element of a recusal motion" which is "judicially implied in § 455." 902 F.2d at 1155. Given that blanket prescription, we decline to read *Owens's*

timeliness requirement so narrowly as to exclude § 455(b).

Our dissenting colleague correctly observes that *Owens* cites a case discussing § 455(a) alone, and that our later cases in that line have yet to address § 455(b).[6] The limitations of past cases, however, are not controlling, particularly because the policy rationale underlying *Owens's* timeliness requirement applies just as forcefully to § 455(b) as to any other recusal scenario.

Here—just as with a § 455(a) recusal, for example—the requirement of timeliness "prohibits knowing concealment of an ethical issue for strategic purposes," *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989), and "is vital ... to prevent waste and delay," *Owens,* 902 F.2d at 1156. Meanwhile, the non-waivability of a § 455(b) recusal does not excuse a party's delay in filing. As the Fifth Circuit explained, "waiver and timeliness are distinct issues." *York*, 888 F.2d at 1055. Whereas "section 455(e) prohibits the judge and the parties from agreeing among themselves to abrogate section 455(b)," a "timeliness requirement forces the parties to raise the disqualification issue at a reasonable time in the

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[6] The dissent says that our decision in *United States v. Lindsey*, 556 F.3d 238 (4th Cir. 2009), cuts against imposing a timeliness requirement under § 455(b). With all respect, we do not share that view. In *Lindsey*, the presiding district court judge had participated in defendant Lonnie Robinson's case twelve years earlier as an Assistant United States Attorney. Though the judge did not recall his participation in the earlier case, nor was he made aware of it, we vacated his order. But in that case, Robinson did not learn of the judge's prior involvement until after filing his appeal. *See id.* at 246–47. Thus, no timeliness issue ever arose: the case is wholly inapposite here.

litigation." *Id.* And even if the mandatory text of § 455 does imply a quasi-jurisdictional limitation on a judge's authority to hear a case, in our view, that limitation must be balanced against the interests of fairness and efficiency served by the timeliness requirement we announced in *Owens*.

The dissent criticizes our reading of *Owens* as finding no support in the statutory text of § 455(b). We note that textual support for a § 455(a) timeliness requirement is similarly lacking, and that the language under that provision is similarly mandatory, yet under our precedent that requirement is beyond dispute. In any event, while we certainly agree that our analysis must begin with the statute's plain language, the absence of a timeliness provision does not foreclose further inquiry here. Even the plain meaning of a statute is not conclusive "in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (alteration in original) (internal quotation marks omitted). Section 455 "serves to 'promote public confidence in the integrity of the judicial process.' " Dissent at 43a (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)). In our view, failing to insist on a timeliness requirement for seeking recusal under § 455(b) directly undermines that legislative goal.[7]

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[7] Section 455's legislative history is murky at best. *See Delesdernier v. Porterie*, 666 F.2d 116, 119–121 (5th Cir. 1982). When Congress revised the statute in 1974, the Justice Department did suggest adding an explicit timeliness requirement like that found in § 144. *Id.* at 120. Congress

In keeping with that end, our sister circuits have overwhelmingly found a timely filing requirement to be implied despite the text's silence. *See, e.g.*, *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 789–91 (8th Cir. 2009) (§ 455(a) and (b)); *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 447–48 (2d Cir. 2005) (§ 455(b)); *Stone Hedge Props. v. Phoenix Capital Corp.*, 71 Fed. Appx. 138, 141 (3d Cir. 2003) (unpublished) (§ 455(b)); *United States v. Rogers*, 119 F.3d 1377, 1380–83 (9th Cir. 1997) (§ 455(a) and (b)); *Summers v. Singletary*, 119 F.3d 917, 920–21 (11th Cir. 1997) (§ 455(b)); *York*, 888 F.2d at 1053–55 (5th Cir. 1989) (§ 455(a) and (b)).

Meanwhile, only two circuits have refused to read in a timeliness requirement. The Seventh Circuit did so first, in *SCA Services v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977), but has since called that decision into question on more than one occasion, *see Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1057, 1060 (7th Cir. 1992) ("SCA Services is a weak precedent [.]") (Posner, J., in chambers); *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985) (observing that "our decision [in SCA Services] stands alone"). The Federal Circuit has also declined to impose a formal § 455 filing requirement, but in doing so created what amounts to a de facto filing obligation under principles

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declined to do so, and our friend in dissent believes that decision "end[s] our inquiry." Dissent at 41a. But the Justice Department's suggestion is hardly the only piece of relevant legislative history. Rather, "prior to the 1974 amendment[,] courts had generally held that a timely objection under the old § 455 was necessary." *Delesdernier*, 666 F.2d at 121. "Thus[,] Congress' [s] failure to act could as easily have been the result of a belief that the judicial gloss on old section 455 would survive." *Id.* (internal quotation marks omitted).

of equity. *See Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1421 (Fed. Cir. 1989) (finding no strict timeliness requirement but denying Kodak's requested relief due to its unreasonably tardy § 455 objection).

We recognize the countervailing interest in removing any judge who bears even the slightest appearance of partiality. But we should not ignore the harm that would ensue if litigants were permitted to treat motions for recusal as little more than a stratagem. As the Fifth Circuit observed, "it might legitimately be asked whether the spectacle of an attorney dragging his opponent through a long and costly proceeding, only to conclude by moving for disqualification of the judge, is not equally detrimental to public impressions of the judicial system" as is a potentially biased judge. *Delesdernier*, 666 F.2d at 121 (internal quotation marks omitted). "Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations...." *Id.* We should not subvert that legislative intent merely because a party instead seeks recusal under § 455(b).

Nor are we moved by the fact that parties may not waive recusal under § 455(b). In that context, everyone (the judge and the parties) has acknowledged a conflict, but seeks nonetheless to ignore it. Thus, waiver cannot be said to prejudice one party in particular, and will not produce the gamesmanship we condemn here.

The same must be said of § 455(f). That provision permits a judge with a financial conflict of interest under § 455(b)(4) to remain on the case if he has devoted substantial time to the matter and divests

himself of the interest.[8] The dissent reads the limitation of this provision to financial conflicts alone as a legislative determination that "timeliness and efficiency are less important than ensuring that the impartiality of the judiciary is upheld." Dissent at 43a. As with the waiver provision, however, § 455(f) presents a clean trade-off between efficiency and impartiality. It does not address the concerns about tactical sandbagging present in this case.

The dissent also contends that our decision today "pivots responsibility [for recusal] from the judges to the litigants." Dissent at 44a. That is not entirely correct. We agree with our friend that when a judge "is aware of grounds for recusal under section 455, that judge has a duty to recuse himself or herself." Dissent at 44a (internal quotation marks omitted). The scenario we address here arises only when a judge independently determines, even if wrongly, that he need not recuse *and* a party does not affirmatively seek recusal—that is, until an adverse decision has been handed down. Both efficiency and integrity require that we not reward a party's tactics in these circumstances.

E.

Having held that *Owens's* timely-filing requirement applies to recusal motions under § 455(a) and (b) alike, we next consider whether Kolon complied with that requirement by "rais[ing] the disqualification ... [of the judge] at the earliest

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[8] The district judge's May 2009 disclosure of a financial interest does not present an issue under § 455(f), as § 455(b)(4) requires recusal only where a financial interest not immediately in controversy "could be substantially affected by the outcome of the proceeding."

moment after [its] knowledge of the facts." *Owens*, 902 F.2d at 1156 (quoting *Satterfield v. Edenton–Chowan Bd. of Educ.*, 530 F.2d 567, 574–75 (4th Cir. 1975)). It did not.

The fact that the district court judge had been a partner at McGuireWoods at the time of the *Akzo* litigation was public knowledge when Kolon first sought discovery of the *Akzo* case materials in the antitrust case in August 2009. Given Kolon's scouring of the *Akzo* litigation court records, it further seems clear that Kolon had long known that McGuireWoods represented DuPont in the *Akzo* case. Kolon was also formally alerted to the potential conflict in May 2009, when the clerk of court issued its notice to the parties informing them of the judge's financial interest in an entity affiliated with McGuireWoods. Finally, Kolon became aware of the judge's direct (if negligible) involvement in the *Akzo* litigation in August 2010, when DuPont produced the *Akzo* files and privilege log.

In sum, Kolon knew every fact that eventually predicated its recusal motion almost a year before it first suggested recusal might be appropriate, in July 2011, and over a year before it finally filed its first recusal motion, in November 2011. On this record, Kolon quite clearly failed to "raise the disqualification ... [of the judge] at the earliest moment after [its] knowledge of the facts." *Id.*[9]

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[9] We recognize that Kolon filed its motion to recuse in this case *before* the district court's issuance of an adverse ruling on summary judgment. But its actions here should not be viewed in a vacuum. Recall that Kolon's antitrust claims arose as a counterclaim to DuPont's trade secrets action, which proceeded more quickly than the antitrust case, before the same district

Nor, in our view, is Kolon's untimeliness excused by the fact that DuPont knew first of the district court judge's involvement in the *Akzo* case and failed to alert the court of that fact until it eventually produced its privilege log in August 2010. For one, the judge's direct involvement in the *Akzo* case was not the only (or even necessarily the strongest) basis for Kolon's eventual § 455(b)(2) recusal motion: if, as Kolon believed, the *Akzo* litigation was actually a matter in controversy, the mere involvement of the judge's former law partners—of which Kolon was clearly aware—would have required his recusal. For another, DuPont's initial withholding of the relevant communications does not explain why, after its eventual disclosure, Kolon failed to raise the disqualification issue for nearly a year.

Our dissenting colleague warns that our decision as to recusal will only diminish public respect for our profession. "At the end of the day," he writes, our "determination that Kolon's recusal requests were untimely means that a district judge who ... is no longer permitted to conduct further proceedings involving the trade secrets claims[ ] presided over a trial that ended in a one billion dollar verdict and a twenty-year worldwide production shutdown injunction." Dissent at 49a (emphasis omitted). The district judge did preside over such a trial, and our

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judge. In that case, the judge issued a series of rulings universally adverse to Kolon, and a jury rendered a $920 million verdict for DuPont. This had all transpired by the time Kolon filed its recusal motion in the antitrust case. So while Kolon's sandbagging may not be obvious in the isolated context of the antitrust case, a global view of the relevant events makes clear that Kolon held its fire on recusal until after suffering a defeat in the trade secrets case.

decision here cannot rewrite the past. We have concluded separately, however, that the trade secrets verdict must be vacated based on the judge's evidentiary rulings. In our view, a single verdict—however large—that no longer exists can hardly impair public confidence more than would a rule transforming recusal under § 455 into an "additional arrow in the quiver of advocates in the face of [anticipated] adverse rulings." *In re Kan. Pub. Emps. Ret. Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996) (alteration in original) (internal quotation marks omitted). We therefore hold that the district court acted within its discretion in denying Kolon's recusal motion on timeliness grounds.[10]

III.

We next consider Kolon's challenges to certain of the district court's discovery rulings. We review such rulings for abuse of discretion, which may be found where "denial of discovery has caused substantial prejudice." *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004).

A.

Throughout discovery, to enable its experts to perform their analysis, Kolon sought access to DuPont's transaction-level and market-segment sales, pricing, and margin data. The district court denied Kolon's initial requests for this information as overly broad and unduly burdensome, but gave Kolon leave to reformulate its request. Conceding that its initial requests had been overbroad, Kolon eventually requested production of a spreadsheet with data fields

[10] In light of our holding, we do not address the district court's alternative ruling that, on the merits, recusal was not required.

relevant to certain contested issues. The request indicated that the responsive document should be in native format from "any existing database." Appellee's Br. at 43 (emphasis omitted).

The district court again denied Kolon's request, concluding that (1) DuPont had already produced extensive documentation on the pertinent topics, such that the requested data would not be any more relevant than the information DuPont had already provided; (2) the request remained "sweeping and extensive"; (3) DuPont had shown that production of the requested documents would be "significantly burdensome"; and (4) the request had been filed very late in the discovery period, without adequate explanation for the delay by Kolon. J.A. 1020–22.

While we do not necessarily share the district court's view that Kolon's requested transaction-level data would have been no more relevant than the aggregate data DuPont had theretofore provided, we nevertheless find that the discovery denial was sufficiently justified by the court's determination that the production would have been unduly burdensome. Kolon insists that the burden to DuPont was minimal because it requested only a "single spreadsheet" which it said could be "readily compiled from any existing database," Appellant's Br. at 43 (emphasis omitted), and because an affidavit from DuPont's Global Financing Director indicated that DuPont already had an existing spreadsheet containing some of the requested transaction-level data. But this ignores the sweeping nature of the information requested, which included all transaction-level details regarding customers, geographic location, dates, products, amounts, price, cost, margins, and profits. And even if

DuPont did have this information in "existing database[s]," that does not mean it would not have been very burdensome to compile the information into a "single spreadsheet." *Id.*

Particularly considering the district court's "wide latitude in controlling discovery," *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 195 (4th Cir. 2003), we decline to disturb its ruling.

B.

Kolon also appeals the district court's grant of a protective order barring a Rule 30(b)(6) deposition of DuPont on its strategic use of supply agreements. Justifying that order, the district court explained that Kolon had violated Federal Rule of Civil Procedure 30(b)(1) and Rule 30(H) of the Local Rules for the United States District Court for the Eastern District of Virginia by "failing to give reasonable written notice ... for [a] replacement deposition notice that it served on October 21, 2011," and had wasted the time the court had extended it for completion of its depositions. J.A. 2715.

Again, we see no cause to disturb the district court's discretionary ruling. While Kolon attempts to pin blame for the discovery delays on DuPont, it concedes that it gave only five days' notice for the replacement deposition notice it served on October 21, 2011. As the district court determined, this violated Local Civil Rule 30(H), which generally requires eleven days' advance notice of a deposition, and Federal Rule Civil Procedure 30(b)(1), which requires "reasonable" notice. Although Kolon maintains that the five-days' notice was reasonable under the circumstances, the district court acted within its discretion in concluding otherwise.

IV.

Finally, we consider Kolon's challenge to the district court's grant of summary judgment on its two antitrust claims—a ruling we review de novo, viewing all facts and reasonable inferences therefrom in the light most favorable to Kolon, the nonmoving party. *See Pueschel v. Peters*, 577 F.3d 558, 563 (4th Cir. 2009).

In general, summary judgment is appropriate where there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We have explained that summary judgment is "an important tool for dealing with antitrust cases," *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991) (en banc), and that antitrust cases are "particularly well-suited for Rule 56 utilization" due to the "unusual entanglement of legal and factual issues" they often present, *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995).

A.

We first review the district court's grant of summary judgment on Kolon's monopolization claim.

Under § 2 of the Sherman Act, a defendant is liable for a monopolization claim when that defendant (1) possesses monopoly power and (2) willfully acquires or maintains that power. *DuPont I*, 637 F.3d at 441. In granting summary judgment to DuPont, the district court held that Kolon failed to create a genuine issue of material fact on either prong,

concluding that DuPont neither possessed monopoly power nor engaged in willful maintenance of such power. We address each element in turn.

1.

"Monopoly power is the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). A defendant possesses monopoly power in the relevant market if it is "truly predominant in the market." *White Bag Co. v. Int'l Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974). Although there is no fixed percentage market share that conclusively resolves whether monopoly power exists, the Supreme Court has never found a party with less than 75% market share to have monopoly power. *Antitrust Laws & Trade Regulation: Desk Ed.* § 3.02[2][c][ii]. And we have observed that "when monopolization has been found the defendant controlled seventy to one hundred percent of the relevant market." *DuPont I*, 637 F.3d at 450 (quoting *White Bag*, 579 F.2d at 1387).

Beyond percentage market share, "some courts have also focused on the durability of the defendant's market power, particularly with an eye toward other firms' (in)ability to enter the market." *Id.* at 451 (citing cases).

Applying these standards, the district court held that DuPont lacked monopoly power. Whereas (according to our ruling in *DuPont I*) Kolon had adequately pleaded the monopoly power element by alleging that DuPont had controlled over 70% of the relevant market, at the summary judgment stage the district court found that DuPont actually possessed significantly less than the alleged 70% of that market. *Kolon Indus., Inc., v. E.I. du Pont De Nemours & Co.*,

No. 3:11–cv–622, 2012 WL 1155218, at *12 (E.D. Va. Apr. 5, 2012). "In fact," the court observed, "Kolon's own expert takes the view that DuPont had a maximum market share of 59 percent during the relevant time period, and that DuPont's market share decreased to 55 percent during that three year period rather than increased." *Id.*

This decline in DuPont's market share, combined with Teijin's corresponding ascendance and the fact that DuPont was charging lower prices in the United States than in Europe (which Kolon identified as a comparable market), led the court to its conclusion. "[T]he fact that there are significant entry barriers," the district court continued, "is insufficient to fill the factual gaps in Kolon's monopolization claim." *Id.* "DuPont clearly lacks the power to control prices and exclude competition," the court summarized, "otherwise, it would have been able to prevent the decrease in its market share and the rise of one of its major competitors." *Id.*

Even viewing all evidence in the light most favorable to Kolon, we agree with the district court that DuPont did not possess monopoly power in the U.S. para-aramid market during the relevant period between 2006 and 2009. First, although Kolon is correct that DuPont's market share of less than 60% during the relevant period does not necessarily foreclose a finding of monopoly power, it does weigh heavily against such a finding. Quite simply, this percentage falls significantly short of where we have previously drawn the line for monopoly power. *See DuPont I*, 637 F.3d at 450 (identifying 70% market share as the bottom of the range for a finding of monopoly power).

Meanwhile, although Kolon is also correct that certain other factors do demonstrate DuPont's strength in the market (e.g., high barriers to entry, ability to price discriminate, high profit margins), a showing of DuPont's "market power" is not itself sufficient to prove that DuPont possesses "monopoly power." *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 requires, of course, something greater than market power under § 1."). Furthermore, this evidence falls short of showing DuPont's durability in the market. As the district court observed, uncontested facts demonstrate that DuPont has experienced a steady, decades-long loss in significant market share to Teijin.

Ultimately, in light of DuPont's reduced market share and lack of durable market power, the evidence cannot sustain a jury finding that DuPont had the "power to control prices or exclude competition," *United States v. du Pont*, 351 U.S. at 391, or was "truly predominant in the market" during the relevant period, *White Bag*, 579 F.2d at 1387.

2.

Even if Kolon had presented a triable issue on the monopoly-power element, Kolon also needed to show that DuPont willfully maintained that power. To violate this prong, a defendant must engage in conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak*, 504 U.S. at 482–83. On this element, Kolon's theory was—and is—that DuPont maintained its alleged monopoly power through the use of long-term, multi-year, exclusive supply agreements with certain U.S. para-aramid customers.

Although exclusive dealing agreements are not per se illegal, they "may be an improper means of acquiring or maintaining a monopoly." *DuPont I*, 637 F.3d at 451 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966)). The Supreme Court has held that an exclusive dealing arrangement does not violate antitrust laws unless its probable effect is to "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The Court explained:

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Id. at 329.

Along these lines, we have observed that "[t]he market share foreclosed is important because, for the contract to adversely affect competition, 'the opportunities for other traders to enter into or remain in that market must be significantly limited[.]'" *DuPont I*, 637 F.3d at 451 (quoting *Tampa Elec.*, 365 U.S. at 328). Once a plaintiff has demonstrated substantial foreclosure, it must then also demonstrate that the conduct had "a negative impact on competition in the market as a whole." *Chuck's Feed &*

Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1295 (4th Cir. 1987).

The district court held there was no genuine issue that DuPont's supply agreements had not foreclosed a substantial portion of the market. In its view, Kolon had not sufficiently attempted to quantify foreclosure of the entire relevant market, and instead had focused only on DuPont's alleged foreclosure of particular market segments. Kolon's evidence of the degree of foreclosure in those segments, which the court characterized as "scant at best," did "nothing to reveal the amount of foreclosure in the [para-aramid] market as a whole." *Kolon*, 2012 WL 1155218, at *14. The court concluded that since DuPont had supply agreements—many of which were non-exclusive—with only twenty-one of approximately 1,000 potential commercial U.S. para-aramid customers, the percentage of foreclosure could not, "as a matter of law, constitute sufficient grounds for a finding of substantial foreclosure." *Id.* at *15.

The court also concluded that Kolon had "put forth no evidence" that DuPont's supply agreements had a negative effect on overall competition, noting that Teijin's "relentless ascendance" fatally undercut that claim. *Id.* Finally, the court rejected Kolon's argument that DuPont's twenty-one supply arrangements substantially foreclosed the entire relevant market by blocking Kolon from crossing a "critical bridge" to "high volume" customers. *Id.* at *16–18.

On appeal, Kolon again stresses its "critical bridge" theory. While it does not deny that DuPont had supply agreements with only twenty-one of the roughly 1,000 potential U.S. commercial para-aramid customers, Kolon contends that the district court's

emphasis on those figures—and its disregard of the "probable effect of the contract[s] on the relevant area of effective competition," *Tampa Elec.*, 365 U.S. at 329—was shortsighted. Pointing to evidence that DuPont perceived Kolon's market entry as a threat, Kolon argues that DuPont "strategically entered into supply agreements with high-volume customers in the key commercially sustainable entry segments ... that Kolon sought to enter." Appellant's Br. at 7, 27–28. Kolon submits that despite the relatively low number and short duration of DuPont's supply agreements, these agreements "choked off the 'critical bridge' to Kolon's entry into the U.S. market" because they foreclosed Kolon's access to the most important high-volume customers. *Id.* at 32.

Kolon points to two cases from the Third Circuit which, in its view, embrace this "critical bridge" approach. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (reversing summary judgment, holding that Dentsply's exclusivity agreements with key product distributors could deny efficient scale to competitors); *LePage's Inc. v. 3M*, 324 F.3d 141, 160 (3d Cir. 2003) (en banc) (reversing summary judgment, holding that 3M's bundled rebate agreements with superstores like K–Mart and Wal–Mart could have cut LePage's off from "key retail pipelines necessary to permit it to compete profitably").

While we acknowledge that a singular emphasis on the percentage of *customers* foreclosed cannot resolve the inquiry (as foreclosure of a few important customers could substantially foreclose access to a market), we agree with the district court that Kolon failed to show what "proportionate volume of

commerce" in the entire relevant market was foreclosed by DuPont's supply agreements. *Tampa Elec.*, 365 U.S. at 329; *see also DuPont I*, 637 F.3d at 451 (discussing the importance of market share foreclosed). Likewise, although Kolon's "critical bridge" theory is certainly plausible, the evidence does not support its application here.

Unlike the plaintiffs in *Dentsply* and *LePage's*, Kolon offered no evidence that access to the foreclosed customers (or even to the identified market segments) was necessary to achieve scale in the broader U.S. para-aramid market. And even if we assume the significance of those customers and market segments, Kolon does not dispute that DuPont had supply agreements with fewer than half of its identified "key" customers within those segments.

Meanwhile, DuPont persuasively distinguishes *Dentsply* and *LePage's* based on the fact that the defendants in those "critical bridge" cases foreclosed the plaintiffs' access to distribution networks rather than end-customers. We are not convinced that, as Kolon contends, this is "a distinction without a difference." Reply Br. at 15. As the district court observed, unlike with Dentsply's and 3M's agreements that foreclosed access to distribution networks shown to be necessary to reach many end-customers, "the record presents no reason to think that Kolon could not sell to other customers occupying the same segment of the para-aramid market ... as customers that have supply agreements with DuPont." *Kolon*, 2012 WL 1155218, at *18.

In sum, we conclude that neither the probable nor the actual effect of DuPont's supply agreements was to "foreclose competition in a substantial share of the

line of commerce affected." *Tampa Elec.*, 365 U.S. at 327. Accordingly, those agreements do not violate the willful maintenance prong of our § 2 monopolization inquiry. Because Kolon failed to raise a genuine issue of material fact as to either prong, summary judgment was appropriate on its monopolization claim.

B.

We next review the district court's grant of summary judgment on Kolon's attempted monopolization claim.

"Attempted monopolization employs 'methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.' " *DuPont I*, 637 F.3d at 453 (quoting *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166 (4th Cir. 1992)). To prevail on an attempted monopolization claim under § 2, a claimant must show (1) a specific intent to monopolize a relevant market, (2) predatory or anticompetitive acts, and (3) a dangerous probability of successful monopolization. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Focusing only on the final two prongs, the district court found neither satisfied since (1) Kolon had failed to demonstrate substantial foreclosure of the relevant market resulting from DuPont's supply agreements, meaning there was no anticompetitive conduct; and (2) DuPont had lost market share during the relevant period and had failed to prevent Teijin's ascendance, meaning there was no dangerous probability of successful monopolization by DuPont.

Kolon first contends that DuPont's supply agreements were anticompetitive, arguing that DuPont entered these agreements against its own interest in order to block Kolon's market entry. Appellant's Br. at 31–32 (citing *M & M Med. Supplies*, 981 F.2d at 166 (noting that where "a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory")). On the "dangerous probability of success" prong, Kolon maintains that even if DuPont's share of the U.S. para-aramid market did not constitute *actual* monopoly power, it was at least consistent with a "dangerous probability" of achieving such power. *Id.* at 23–24 (citing *M & M Med. Supplies*, 981 F.2d at 168 (4th Cir. 1992) ("[C]laims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied.")). And Kolon notes that even though "DuPont's market share declined slightly over the three-year period, that does not, as a matter of law, preclude a finding of monopoly power, much less a dangerous probability of achieving it." *Id.* at 24 (citing cases finding monopoly power despite a declining market share).

But again, even viewing the evidence in the light most favorable to Kolon, the claim fails.

First, as discussed above, DuPont's alleged anticompetitive conduct—its customer supply agreements—did not have the probable effect of "foreclos[ing] competition in a substantial share of the line of commerce affected." *Tampa Elec.*, 365 U.S. at 327; *see also* IIIB Areeda & Hovenkamp, *Antitrust Law* ¶ 806a, at 412 (3d ed. 2008) ("[T]he same basic definition of exclusionary conduct should apply to both

monopolization and attempt claims."). Nor, contrary to its suggestion, did Kolon show that the agreements were anticompetitive as without business justification or against DuPont's own interest. Rather, DuPont introduced unrebutted evidence that it entered the supply agreements as a competitive response to Teijin's use of that same practice, and because customers requested them.

Second, Kolon has not raised a genuine issue that DuPont had a "dangerous probability" of successfully achieving monopoly power during the relevant period. As the district court observed, DuPont's market share had been in steady decline for seventeen years, and DuPont has proven unable to control U.S. prices or exclude Teijin from entering the market. And even if declining market share does not preclude a finding of monopoly power, Kolon pointed to no affirmative evidence indicating a "dangerous probability" that DuPont would sooner or later regain its former market dominance.

Accordingly, we affirm the district court's grant of summary judgment to DuPont on Kolon's attempted monopolization claim.

V.

In sum, we conclude that following *Owens,* recusals under 28 U.S.C. § 455(b) include a judicially implied timely-filing requirement, and that the district court acted within its discretion when it denied Kolon's recusal motion on timeliness grounds.

We defer to the district court's considerable discretion in overseeing discovery and will not disturb its discovery rulings. On the merits of Kolon's antitrust suit, we agree with the district court that

Kolon failed to raise a triable issue of material fact sufficient to sustain either its attempted or actual monopolization claims.

The judgment of the district court is hereby *AFFIRMED*.

SHEDD, Circuit Judge, dissenting:

I dissent. Federal judges have an "absolute duty ... to hear and cases within their jurisdiction," *United States v. Will*, 449 U.S. 200, 215 (1980), but "[f]airness ... requires an absence of actual bias in the trial of cases," *United States v. Werner*, 916 F.2d 175, 178 (4th Cir. 1990) (internal quotation marks omitted). To that end, "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* (internal quotation marks omitted). Consistent with this principle, Congress has explicitly created another absolute duty for federal judges: they must recuse themselves from any case where, "in private practice [the judge] served as a lawyer in the matter in controversy, or a lawyer with whom [the judge] previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. § 455(b)(2). In creating this duty, Congress "placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit." *Liteky v. United States*, 510 U.S. 540, 548 (1994).

I thus disagree with the majority's unwarranted imposition of a timeliness requirement that shifts the burden of bringing forward recusal grounds under § 455(b)(2) from the judge to the litigants. That decision flies in the face of the plain language and thwarts the clear congressional purpose of § 455(b)(2). It is also inconsistent with our precedent. *See United States v. Lindsey*, 556 F.3d 238, 246–47 (4th Cir. 2009). Even accepting that timeliness plays some limited role under § 455(b)(2), I further disagree with the majority's conclusion that Kolon Industries, Inc. (Kolon), acted in an untimely manner here. Rather,

Kolon moved for the district judge's recusal (on grounds with which the judge was already well aware) within a reasonable time after being presented with voluminous discovery that had been impeded by E.I. DuPont De Nemours & Company (DuPont). Finally, in my view, the district judge presiding in this case falls squarely within the terms of § 455(b)(2) in both this appeal and the companion appeal, *E.I. DuPont De Nemours & Co. v. Kolon Industries Inc.*, No. 12–1260 (*Trade Secrets Case*). I would thus vacate the summary judgment order in this appeal and remand for further proceedings.

I.

I begin with a brief recitation of the pertinent facts. DuPont has commercially produced para-aramid fibers under the name Kevlar© since the 1970s. In the 1980s, DuPont engaged in worldwide litigation with Akzo N.V., which sold a competing para-aramid fiber, Twaron©, including a case filed in the Eastern District of Virginia (the *Akzo* litigation). In that litigation, DuPont was represented by McGuire Woods & Battle (now McGuireWoods) and Fitzpatrick, Cella, Harper & Scinto (Fitzpatrick Cella). During the time of the litigation, the district judge below was a partner at McGuireWoods' Richmond office. Documents reflect that during the *Akzo* litigation the district judge spoke with co-counsel from Fitzpatrick Cella on the phone and sent a letter with a copy of Akzo's complaint attached to him.

In 2009, DuPont instituted this action against Kolon, arguing that Kolon misappropriated its trade secrets. As the majority recounts, the district judge, through the clerk of court, issued a brief notice informing the parties of the judge's prior partnership

at McGuireWoods and instructed the parties to move for recusal if they believed it was warranted. The judge took no further action on the issue. Kolon filed an answer and a counterclaim, contending that DuPont's actions in the market for para-aramid fibers violated the antitrust laws. In August 2009, early in discovery, Kolon sought access to documents from the *Akzo* litigation, believing that DuPont had made public the trade secrets it was now claiming Kolon had misappropriated. DuPont's counsel (McGuireWoods) informed Kolon that it had no documents from the *Akzo* litigation. Kolon renewed this request prior to the close of discovery in April 2010 and was again informed that McGuireWoods possessed no documents. Undeterred, after the close of discovery Kolon served a subpoena on Fitzpatrick Cella, which revealed that Fitzpatrick Cella did have documents from the *Akzo* litigation. These materials were turned over to Kolon in August 2010. The involvement of the district judge, including the letter he sent to Fitzpatrick Cella, was not highlighted, but was part of a roughly 59,000 page production.

While the district judge was not made aware of the letter until July 2011, it cannot be disputed that throughout discovery the judge was aware that Kolon intended to defend itself against DuPont's claims by contending that DuPont had publicized the trade secrets in the *Akzo* litigation. Upon being informed of the letter in July 2011, prior to trial in the trade secrets case and prior to severance of the antitrust claims,[1] the judge stated that he had "no recollection whatsoever" of any involvement in that litigation.

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[1] The antitrust claims, which are the subject of this appeal, were severed from the trade secrets claims in September 2011.

(J.A. 689). As the majority further recounts, the judge refused to rule on recusal until Kolon formally filed a motion for recusal in both the trade secrets and the antitrust case.

Eventually, the trade secrets claims proceeded to trial and culminated in a jury award of $919.9 million. The district judge later entered a twenty-year worldwide production shutdown injunction against Kolon and granted DuPont's motion for summary judgment on the antitrust claims.

II.

Section 455(b) provides that recusal is mandatory, *inter alia,* "[w]here in private practice [the judge] served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. § 455(b)(2). Mandatory recusal is not waivable by the parties. 28 U.S.C. § 455(e). The majority concludes that, although not waivable, a mandatory recusal under § 455(b) is nonetheless subject to a stringent timeliness requirement and that Kolon simply waited too long in this case. I disagree.

The majority's timely-filing requirement is misconstrued for several reasons. First, it simply constitutes the addition of words to the statute. "When interpreting statutes we start with the plain language." *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd[2]—is to

[2] The majority's reference to the absurdity canon is misplaced. There is nothing absurd about my reading of § 455(b)—as

enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted). The statutory language of § 455(b) could not be plainer; it "sets forth no procedural requirements." *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). *See also Delesdernier v. Porterie*, 666 F.2d 116, 120 (5th Cir. 1982) (noting that "even after" statutory amendments in 1974 " § 455 still contains no explicit procedural requirements"). Congress' omission of any reference to a timely-filed motion as a prerequisite to § 455(b) recusal should end our inquiry.[3] After all, "[w]e do not lightly assume

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discussed *infra*, given the purpose of the statute, it is entirely plausible that Congress did not intend to impose a timely-filing requirement. The absurdity canon allows courts to disregard statutory text when adhering to the text "would result in a disposition that no reasonable person could approve." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234 (2012). But the canon "can be a slippery slope. It can lead to judicial revision of public and private texts to make them (in the judges' view) more reasonable." *Id.* at 237. The hurdle for invoking the canon is thus "a very high one." *Id.* The fact that there is a "plausible reason[]" for omitting a timely-filing requirement in § 455(b) "forecloses recourse to the absurdity canon." *Little v. Shell Exploration & Prod. Co.*, 690 F.3d 282, 291 (5th Cir. 2012).

[3] The majority compounds its error by requiring not only that recusal be raised in a timely fashion by the parties, but that recusal be raised in a formal motion. As noted, § 455(b) includes no procedural requirements. Moreover, the requirement of a motion is further undercut by the existence of 28 U.S.C. § 144. That statute provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no

that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).

Second, as if this silence were not enough, § 455 contains two additional signals that a timely-filed motion is not required under § 455(b). First, § 455(e) provides that mandatory recusals may not be waived by the parties. Even accepting that "waiver and timeliness are distinct issues," *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989), the non-waiver of § 455(b) recusals reinforces the mandatory nature of the section; if the presiding judge has a triggering event under § 455(b), the judge is disqualified and must recuse even if the parties oppose his recusal. Second, § 455(f) provides yet another signal. That provision states that, "[n]otwithstanding" the statute's preceding provisions, if a judge has invested "substantial judicial time" "to the matter" and then discovers that he has a financial conflict of interest under § 455(b)(4), the judge may remain in the case if he "divests himself or

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> further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 144, which was in existence at the time Congress amended § 455, clearly illustrates that Congress knew how to require a formal filing raising a judge's bias or prejudice and declined to do so in § 455(b).

herself of the interest." 28 U.S.C. § 455(f). This provision represents Congress's response to judicial economy concerns, and, importantly, it is limited to a single provision of § 455(b). The fact that Congress spoke specifically to this one area suggests that timeliness and efficiency are less important than ensuring that the impartiality of the judiciary is upheld.

In addition, I believe a timely-filing requirement subverts the statute's intent. Section 455 serves to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). *See also Delesdernier*, 666 F.2d at 121 (noting statute serves "to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality"). "Put simply, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself." *United States v. Jordan*, 49 F.3d 152, 155–56 (5th Cir. 1995). The statute was amended in 1974[4] to harmonize § 455 with existing law by "clarify[ing] and broaden[ing] the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1987)." *Liljeberg*, 486 U.S. at 858 n.7. These codes of

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[4] Prior to the 1974 amendments the statute provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970 ed.).

conduct exist independently of § 455 and must be followed by judges absent action by a party. Indeed, our entire recusal system is based upon the notion that, when the judge has information that triggers one of the subsections of § 455(b), that judge will recuse himself or herself regardless of any urging by a party. In recognition of this fact, § 455 "is directed to the judge, rather than the parties, and is self-enforcing on the part of the judge." *Sibla*, 624 F.2d at 867–68. Thus, if the judge "is aware of grounds for recusal under section 455, that judge has a duty to recuse himself or herself." *Id.* at 868. While these provisions "may be asserted also by a party to the action," the primary duty remains with the judge. *United States v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980).[5] The timely filing requirement, as implemented by the majority, pivots responsibility from the judges to the litigants when that duty and responsibility should lie with us. As the Federal Circuit has explained:

> Application of a "timeliness" requirement requires a fixed point or bench mark from which the timeliness or untimeliness of an action can be measured (e.g. 10 days after event X; before event Y). There is no such provision anywhere in section 455. Nor could there be. *The statute deals only with action of a judge. It has nothing to do with actions of counsel.*

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[5] To this end, we require parties to file a Corporate Disclosure Statement under Federal Rule of Appellate Procedure 26.1 so that we can generate our own disqualifications; we do not require each party in every appeal to file a motion requesting the recusal of certain judges.

Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1418 (Fed. Cir. 1989) (emphasis added).

Finally, to the extent one insists that timeliness should play a role in recusal, I agree with Kolon that the role should be tied to equitable considerations and limited in scope. In fact, the earliest cases applying a timeliness requirement were concerned primarily with parties' gamesmanship after losing a case. For instance, in *York*, 888 F.2d at 1055, cited by the majority, the court noted that a timeliness requirement served to "proscribe motions that would have invalidated a fully completed trial" and chastised parties that would sit on information gleaned prior to trial until the trial's outcome. *See also Conforte*, 624 F.2d at 879–880 (finding recusal motion untimely where information was learned prior to trial but not raised until after trial); *Stone Hedge Props. v. Phoenix Capital Corp.*, 71 Fed. Appx. 138, 141 (3d Cir. 2003) (motion untimely when party learned of information prior to judgment but recusal was not raised until five years later, well after judgment and appeal); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 334 (2d Cir. 1987) (noting whether motion was "made after the entry of judgment" is one of four factors in determining if request was timely). A timeliness requirement in such circumstances—where a party learns of information that the judge does not (or may not) possess but then sits on that information as a litigation strategy—makes sense as a matter of fairness or equity. Thus, in most of these cases "[t]he refusal of courts to 'start over' has rested not on the mere passage of time, but on the events that had occurred and the balancing of equity/fairness considerations in deciding whether to expunge those

events from history's pages." *Polaroid Corp.*, 867 F.2d at 1419.

Applying such a limited rule here leads inescapably to the conclusion that Kolon acted in a timely fashion. As recounted above, DuPont impeded the discovery of *Akzo* documents and turned over voluminous discovery that did not highlight the district judge's role in the prior litigation. Moreover, at all times the district court was aware that Kolon was pursuing discovery of the *Akzo* litigation. Given these circumstances, Kolon's specific raising of recusal prior to trial in the trade secrets claims is sufficiently timely under § 455(b)(2).

The majority reaches the opposite conclusion by misconstruing, and then incorrectly relying on, *United States v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990).[6] In my view, *Owens* is limited to recusals under § 455(a) and has no relevance to cases, like this one, involving § 455(b). Section 455(a)[7] provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). *Owens* itself relied on a case interpreting only § 455(a), *see Delesdernier*, 666

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[6] The majority also relies, in part, on the decisions of our sister circuits imposing a timeliness requirement. Of course, "agreement among courts of appeals on an issue ... does not invariably garnish Supreme Court approval." *McMellon v. United States*, 387 F.3d 329, 361 (4th Cir. 2004) (en banc) (Motz, J., dissenting). Given the plain language of § 455(b), I find these decisions unpersuasive.

[7] This section, like § 455(b) has no specific timeliness requirement. Nonetheless, for purposes of this case, I accept that the language is more susceptible to a requirement that the party raise the issue with the judge and that such a requirement is mandated by *Owens*.

F.2d at 121,[8] and our cases citing to *Owens'* timeliness requirement have all arisen under § 455(a), *see Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 432 (4th Cir. 2011); *United States v. Whorley*, 550 F.3d 326, 339 (4th Cir. 2008). Conversely, of more relevance here is *United States v. Lindsey*, 556 F.3d 238, 246–47 (4th Cir. 2009). In *Lindsey*, the district judge had previously worked as an Assistant United States Attorney on the criminal defendant's case more than a decade earlier. For the first time on appeal of the denial of his 18 U.S.C. § 3582(c) motion, the criminal defendant raised the potential recusal of the district judge under § 455(b)(3). Although the district judge was unaware of his prior participation, and no one brought it to his attention, "his participation at that time is nonetheless undisputed," and recusal was thus required. *Id.* at 247. In reaching this result, we included neither a citation to *Owens* nor a discussion of timeliness. Instead, we simply concluded that, because the district judge fell within § 455(b), recusal was required regardless of when the issue was raised. Thus, contrary to the majority, I believe our most relevant precedent supports the conclusion that timeliness is not relevant under § 455(b).[9]

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[8] In fact, *Delesdernier* specifically reserved the timeliness question under § 455(b). *See Delesdernier*, 666 F.2d at 123 n.3.

[9] The majority misapprehends the importance of *Lindsey*. According to the majority, *Owens* mandates a timely-filing requirement in all § 455 cases. In *Lindsey*, although the recusal issue was not raised until appeal, there is no discussion about timeliness, which is wholly consistent with my view that timeliness is irrelevant to § 455(b) cases because they hinge on the mandatory nature of the recusal, not the timely raising of it. If timeliness was as important in *all* § 455 cases, as the majority suggests, surely the issue would have at least been identified in

In sum, the rule employed by the majority—that a recusal motion is timely only if raised "at the earliest moment after [its] knowledge of the facts," (Majority Op. at 19a-20a), regardless of whether any delay was caused by gamesmanship or whether it was raised early enough in the litigation that no prejudice would result-is incompatible with the language and purpose of § 455(b) and is not required by our precedent. This case proves the point. The district judge knew, from the outset of litigation, that his prior law firm was representing a client that it represented when he was partner. As discovery began, the judge had before him multiple requests from Kolon to look into the *Akzo* litigation and pleadings and filings, indicating that the *Akzo* litigation was central to Kolon's defense on the merits of the trade secrets claims. This is not a case in which a party discovered, for instance, financial information that the judge was unaware of and sat on that information until after trial. In this case the judge was, at all times, aware of the facts relevant to recusal under § 455(b)(2) and it was up to the judge to self-enforce those statutory provisions.[10] To the extent any burden is placed on Kolon, it satisfied that burden by raising the issue in July, prior to trial on the trade secrets claims.

Lindsey. *Lindsey's* silence on timeliness only reinforces the case's thorough discussion of recusal under § 455(b) as a mandatory proposition.

[10] My opinion should not be read to suggest that the district judge engaged in actual bias or impartiality in this case. Rather, the purpose of § 455(b)(2) is to disqualify judges, even if they have no actual bias in a particular case, because of the great risk of the appearance of bias or impartiality in a certain set of cases. That appearance is the issue in this case.

At the end of the day, the majority's determination that Kolon's recusal requests were untimely means that a district judge who, by the majority's own determination, is no longer permitted to conduct further proceedings involving the trade secrets claims, presided over a trial that ended in a *one billion* dollar verdict and a twenty-year worldwide production shutdown injunction. Such a result does not, I think, inspire public confidence in the judiciary. The majority's rule leaves judges with no enforceable duty to remove themselves from cases absent action by a party. This result cannot be squared with the statute's purpose or language.

III.

Having concluded that Kolon's request is appropriately before this court, I now address whether recusal was required under § 455(b)(2).[11] We have held that a judge "need not recuse himself simply because he possesses some tangential relationship to the proceedings." *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003). In this case, however, the district judge had more than a "tangential" relationship.

Our precedent establishes that the "matter in controversy" includes more than the claims brought by DuPont. In *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976), the criminal defendants were charged with using illegal means to procure the passage of a racetrack consolidation bill in Maryland. The presiding judge's former law firm had represented a

[11] The majority declines to address this issue, yet in the companion case, uses its "supervisory powers" under 28 U.S.C. § 2106 to remand the case for further proceedings before another district judge. *See Trade Secrets Case* at 15–16.

separate group of individuals who were not criminally charged but engaged in similar lobbying efforts. The criminal defendants thus argued that the judge should recuse; as part of this argument, the defendants argued that they were intending to have his former law partner (and some of the clients) testify as to the means they undertook to gain passage of the consolidation bill. The Government opposed recusal, contending that the "matter" was not the "matter in controversy" because it was not the "actual case before the court." *Id.* at 1198. Even accepting that reading of the statute, we found recusal was required because "the actual case before the court consists of more than the charges brought by the government. It also includes the defense asserted by the accused." *Id.* In that case, recusal was thus triggered because the defendants' proposed defense "in part at least, will consist of evidence of matters in which the judge's former partner served as a lawyer." *Id. See also Preston v. United States*, 923 F.2d 731, 733–35 (9th Cir. 1991) (finding § 455(b)(2) matter in controversy requirement satisfied when judge's former law partners represented a company that was not a party to the court case but might be liable in an indemnification proceeding if the plaintiffs prevailed in the underlying case).

As *Rodgers* makes clear, *Akzo* is a matter in controversy in this action. Kolon's defense to DuPont's trade secrets claims is that DuPont made public many of these secrets during the *Akzo* litigation. It cites to, including other materials, a letter from DuPont's counsel, McGuireWoods, stating that DuPont agreed to "totally declassify all trial exhibit documents, all proposed findings of fact and all deposition excerpts and summaries submitted to the Court." (J.A. 12–

1260 at 13347). The district court excluded this evidence—an exclusion we today rule was reversible error. *See Trade Secrets Case* at 14–15. This evidence, so pertinent to Kolon's defense, makes *Akzo* a matter in controversy.

DuPont contends—at least as to this appeal—that the antitrust claims are too attenuated from *Akzo* to be the same matter in controversy. In reality, this litigation is all the same *action* and the same *case*. Moreover, in my view, recusal was required, at the very latest, by July 2011, *prior* to the severance of the trade secret claim from the antitrust counterclaim, which occurred on September 21, 2011. Thus, the district court's mandatory recusal in the trade secrets claims likewise mandates recusal on the antitrust counterclaims brought by Kolon.

IV.

For the foregoing reasons, I would vacate summary judgment and remand for new proceedings before a different district judge. I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. VIRGINIA,
RICHMOND DIVISION.

KOLON INDUSTRIES INC.,

Plaintiff,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,

Defendant.

Civil Action No. 3:11cv622.

Feb. 21, 2012

COUNSEL: Rodney A. Satterwhite, Brian Charles Riopelle, Kristen Marie Calleja, Matthew Devane Fender, Robyn Suzanne Gray, Thomas Moultrie Beshere, III, McGuireWoods LLP, Richmond, VA, Andrew David Kaplan, Astor Henry Lloyd Heaven, III, David Daniel Cross, Jeffrey L. Poston, Kathleen Mary Clair, Kent Alan Gardiner, Luke Peter Van Houwelingen, Crowell & Moring LLP, Washington, DC, Michael Joseph Songer, Shari Ross Lahlou, Stephen Matthew Byers, Terence P. Ross, Crowell & Moring LLP, Washington, DC, for Defendant.

MEMORANDUM OPINION

ROBERT E. PAYNE, Senior District Judge.

This matter is before the Court on Kolon's MOTION FOR RECUSAL AND DISQUALIFICATION (Docket No. 247). For the reasons set forth below, the motion will be denied.

PROCEDURAL HISTORY

On February 3, 2009, E.I. du Pont Nemours and Company ("DuPont") filed a Complaint against Kolon Industries, Inc. ("Kolon") claiming, *inter alia,* that Kolon had "engaged in concerted and persistent actions to wrongfully obtain DuPont's trade secrets and confidential information about [DuPont's] KEVLAR [ ] aramid fiber." Compl. ¶ 1. DuPont also alleged claims for conspiracy, business torts, and conversion. All claims, but the trade secret misappropriation claim, were dismissed either voluntarily by DuPont before trial or upon motion by Kolon before the case was submitted to the jury. Thus, hereafter, the action by DuPont will be referred to as the "Trade Secrets Case."

On April 20, 2009, Kolon filed its ANSWER and a COUNTERCLAIM alleging that DuPont had violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in anticompetitive activity, attempted monopolization and monopolization. *See* Defs.' Answer at 35. DuPont filed a MOTION TO DISMISS the antitrust counterclaim which was granted, with leave to amend. On August 25, 2009, Kolon filed its AMENDED COUNTERCLAIM (Docket No. 50); and on August 31, 2009, Kolon filed its SECOND AMENDED COUNTERCLAIM ("SACC") (Docket No. 59) which was dismissed, again for failing to state

a claim, but also with leave to amend (Docket No. 100).

Kolon declined to further amend the counterclaim and, after the Court entered an Order under Fed. R. Civ. P. 54(b), Kolon appealed the dismissal of the counterclaim. On March 11, 2011, the United States Court of Appeals for the Fourth Circuit reversed the dismissal, holding that Kolon adequately had pled antitrust claims of monopolization and attempted monopolization. *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435 (4th Cir. 2011). The counterclaim will be referred to as the "Antitrust Case."

While the Antitrust Case was on appeal, the Trade Secrets Case was set for trial and extensive discovery was conducted by both sides. The discovery cut-off was set for May 14, 2010 and the case was set to be tried beginning November 3, 2010. Late in the discovery period, DuPont asserted that Kolon had engaged in substantial spoliation of evidence. Thus, the trial set for, November 3, 2010 had to be delayed until discovery respecting spoliation had taken place and the spoliation issue was resolved. *See* MEMORANDUM OPINION and ORDER dated July 21, 2011, 803 F. Supp. 2d 469 (E.D. Va. 2011).

On November 11, 2010, the Trade Secrets Case was set for trial on May 23, 2011 and a schedule was set for pretrial activities to ready the Trade Secrets Case for trial. (Electronic Docket Entry No. 705 as confirmed by Docket No. 745). Because the parties filed a virtually unprecedented number of motions *in limine* and other pretrial motions, the Court found it necessary *sua sponte* to continue the trial so that the

motions could be resolved. Ultimately, the trial of the Trade Secrets Case began on July 21, 2011.

In the Trade Secrets Case, Kolon contended, *inter alia,* that DuPont had waived the secrecy of some of the trade secrets at issue in that case by offering documents and testimony about those secrets in another case without placing the documents under seal and, in some cases, by agreement to remove them from the confidential status which they had been afforded under a protective order. The other case was *Akzo N.V. v. E.I. DuPont de Nemours*, 635 F. Supp. 1336 (E.D. Va. 1986) (hereafter the "*Akzo* Case"). In the Trade Secrets Case, DuPont moved to preclude evidence from the *Akzo* Case (3:09cv58, Docket No. 431). Kolon filed a reciprocal motion seeking to foreclose DuPont from claiming that it had not waived secrecy in the *Akzo* Case. KOLON INDUSTRIES, INC.'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF THE CONFIDENTIALITY OF CERTAIN AKZO DOCUMENTS (3:09cv58, Docket No. 947). Kolon also asserted the same points in its motion for summary judgment in the Trade Secrets Case. KOLON INDUSTRIES, INC.'S MOTION FOR SUMMARY JUDGMENT (3:09cv58, Docket No. 379).

In all of those motions, Kolon asserted that DuPont had waived secrecy in the *Akzo* Case. Kolon argued that certain statements made by a partner in McGuireWoods evinced the waiver of some of the secrets at issue in the Trade Secrets Case. Those motions were filed, briefed and decided during the time from August 30, 2010 to May 16, 2011.

In the *Akzo* Case, Akzo, one of DuPont's competitors in the para-aramid field, sued DuPont for patent infringement. DuPont filed a Counterclaim

seeking to have Akzo's patent declared invalid. The late Honorable Richard L. Williams, sitting without a jury, presided over the *Akzo* Case from May 6, 1985 to May 23, 1986, and judgment was entered against Akzo. *Akzo N.V. v. E.I. DuPont de Nemours*, 635 F. Supp. at 1352–56. DuPont was represented in the *Akzo* Case by the New York law firm, Fitzpatrick, Cella, Harper & Scinto ("FitzpatrickCella"), and McGuire Woods & Battle (now "McGuireWoods"). It is public knowledge that, during the 1980s, the undersigned presiding judge ("presiding judge") was a partner in McGuireWoods.

In the Trade Secrets Case, Kolon sought discovery of documents filed in the *Akzo* Case. The Court files contained no meaningful documents. McGuireWoods advised that it had no documents from the *Akzo* Case and FitzpatrickCella advised McGuireWoods that it had no files from the *Akzo* Case. However, after the close of discovery, Kolon issued a subpoena to FitzpatrickCella for documents in the *Akzo* Case. FitzpatrickCella determined that, in fact, it had a number of files from the *Akzo* Case, most of which were privileged.

In August 2010, the Court required DuPont and FitzpatrickCella to review those files, to produce responsive documents or to file objections, and to serve a privilege log for any privileged documents. On August 17, 2010, DuPont produced about 30 boxes of documents, objected to producing other documents, and served a privilege log. (3:09cv58, Docket No. 409). An entry in the privilege log reflected that the presiding judge had sent to Mr. Fitzpatrick a copy of the Complaint filed by Akzo in the *Akzo* Case.

In the Trade Secrets Case, the motion *in limine* filed by DuPont (3:09cv58, Docket No. 431) was granted by ORDER entered on May 16, 2011 (3:09cv58, Docket No. 1146). The motion *in limine* filed by Kolon (3:09cv58, Docket No. 947) was denied by ORDER entered on March 23, 2011 (3:09cv58, Docket No. 961); and Kolon's motion for summary judgment (3:09cv58, Docket No. 379) was denied by ORDERS entered on September 23, 2010 (3:09cv58, Docket No. 607) and February 11, 2011 (3:09cv58, Docket No. 867).

On July 20, 2011, the day before jury selection in the Trade Secrets Case, Kolon filed its opposition memorandum to an instruction proposed by DuPont (3:09cv58, Docket No. 1247). In that memorandum, Kolon stated that it was:

> compelled to point out that there is *some question whether Your Honor should be adjudicating these matters*. The claim of privilege asserted by DuPont's counsel apparently is one that arises ... in the 1985–86 time frame, a time when Your Honor was a partner in that firm [McGuireWoods] ... Documents produced by DuPont from the files of Fitzpatrick Cella include at least one document indicating a role by Your Honor in the earliest stage of the Akzo litigation, although the extent of that role remains unknown.

Id. at 8 (emphasis added).[1]

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[1] The last quoted sentence suggests that there were other such documents. However, Kolon has neither identified nor produced any such documents.

On July 22, 2011, counsel were convened in a telephone conference to discuss a number of matters about the forthcoming trial. In that conference, counsel for Kolon was asked by the Court to explain the above-quoted, terse reference in the brief filed on July 20. Kolon's counsel explained that the reference was to the May 9, 1985 letter from Mr. Fitzpatrick to the presiding judge. This was the first time that the presiding judge was made aware of Mr. Fitzpatrick's letter.

Subsequently, the documents listed in that entry were produced. The first document was a letter dated May 9, 1985 from Mr. Fitzpatrick at FitzpatrickCella to the presiding judge confirming a telephone conference in which Mr. Fitzpatrick had asked for a copy of Akzo's Complaint. The letter from Mr. Fitzpatrick to the presiding judge, in pertinent part, reads as follows:

> Dear Mr. Payne:
>
> > Confirming our telephone conversation, I would appreciate your telecopying the Complaint directly to our office, as well as to each of the following persons as soon as possible.

(Docket No. 248, Exhibit 23 at 3). [2] The second document was a facsimile cover sheet to FitzpatrickCella also dated May 9, 1985 to which was attached Akzo's Complaint which had been filed May 6, 1985. *Id.*

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[2] The letter also supplied the names and addresses of other lawyers to whom a copy of Akzo's Complaint should be sent.

During further inquiry into the matter, Kolon's counsel represented that they had reviewed all the non-privileged documents from the 30 boxes of FitzpatrickCella files which had been produced and that none of those documents reflected the name of the presiding judge. July 22, 2011 Tr. 20. DuPont's counsel represented that they had reviewed the privileged documents in the FitzpatrickCella files and that the privileged documents did not mention the presiding judge. *Id.* at 19.

Argument and presentation of evidence in the Trade Secrets Case began on July 25. While the trial was underway, DuPont's counsel, at the Court's direction, reviewed some 588 more boxes of files from the archives of FitzpatrickCella and reported that the letter from Mr. Fitzpatrick to the undersigned was the only document in those files containing the name or initials of the undersigned. The telecopy cover sheet forwarding the Akzo Complaint did not mention the presiding judge.

Having seen those two documents (the Fitzpatrick letter and the response telecopy), the presiding judge advised counsel that, "[h]aving reviewed those documents, I have no collection [sic] of having had a conversation with Mr. Cella or Mr. Fitzpatrick. I still don't. And I have no recollection of forwarding the Complaint to him, nor does it prompt in my mind any recollection of any involvement in this litigation." July 27, 2011 Tr. 419.

Thereafter, Kolon said nothing further respecting the matter. Kolon's objection to the instruction proposed by DuPont was overruled. Proceedings in the Trade Secrets Case continued, with the jury returning a verdict after a seven week trial.

Meanwhile, the Antitrust Case was proceeding as well. After the Fourth Circuit reversed the dismissal of the Antitrust Case on March 11, 2011, it was remanded and counsel were given a trial date of March 2, 2012 and were asked to agree upon a discovery order and pretrial schedule (the "Stipulated Schedule"). That was filed on April 28, 2011 (3:09cv58, Docket No. 1125). September 30, 2011 was set as the closing date for fact discovery, and expert discovery was set to close on November 21, 2011. The Stipulated Schedule was amended slightly by the Court. It was not entered until July 8, 2011 (3:09cv58, Docket No. 1219), but meanwhile the parties proceeded with discovery as outlined in the Stipulated Schedule that was submitted on April 28, 2011. By subsequent stipulated amendment entered on October 4, 2011 (Docket No. 95),[3] the trial date was moved to April 4, 2012; the time for taking certain depositions was extended to October 31, 2011; and the time for completion of expert discovery was extended to January 6, 2012.

Since April 28, 2011, discovery in the Antitrust Case has proceeded on the Stipulated Schedule. As a part of Kolon's discovery, it sought documents and depositions about the patent litigation in the *Akzo* Case and about what was described generally as other patent infringement litigation between DuPont and Akzo in the mid–1980's in Delaware, Germany, Japan

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[3] On September 21, 2011, for administrative convenience, and because the trial of the Trade Secrets Case had concluded (post-trial motions were still pending), the Antitrust Case was restyled *Kolon Industries, Inc. v. E.I. du Pont de Nemours and Co.*, and given a new civil action number (C.A.3:11cv622). A new docket numbering system was initiated with the redesignation Order as Docket No. 1.

and Great Britain.[4] The record does not reflect the identities of the law firms representing DuPont in those actions, but it appears, from the record, that McGuireWoods served as counsel only in the *Akzo* Case and was not otherwise involved in any of the other litigation between Akzo and Dupont.

In the Antitrust Case, DuPont objected, *inter alia,* to Kolon's proposed discovery of its files in the *Akzo* Case as well as the patent litigation between DuPont and Akzo in Delaware, Germany, Japan, and Great Britain. Kolon then issued subpoenas to non-parties and also sought a deposition from DuPont under Fed. R. Civ. P. 30(b)(6) respecting, *inter alia* "DuPont's patent litigations with Akzo." On September 26, 2011, DuPont filed DUPONT'S MOTION FOR PROTECTIVE ORDER REGARDING KOLON'S RULE 30(b)(6) DEPOSITION NOTICE AND THIRD PARTY SUBPOENAS ("MOTION FOR PROTECTIVE ORDER") (Docket No. 59; the accompanying brief is Docket No. 60). On October 17, 2011, Kolon filed KOLON'S MOTION TO COMPEL 30(b)(6) DEPOSITION TESTIMONY FROM DUPONT AND RELATED THIRD PARTY DISCOVERY (Docket No. 139; the accompanying brief is Docket No. 140). In sum, the parties filed reciprocal motions.

Then, on November 30, 2011, Kolon filed this motion for recusal. By then, all fact discovery had

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[4] DuPont also filed a trade dispute action in the International Trade Commission. Kolon sought discovery about that matter. Motions respecting that requested discovery have been held in abeyance pending resolution of the recusal motion.

been concluded in the Antitrust Case,[5] except such as might be required as a result of twelve then-pending discovery motions.[6] Summary judgment motions were due on December 2, 2011 and, given that voluminous motions were filed then, they no doubt were in the final stages of preparation well before then.

The foregoing facts form the basic context for the assessment of Kolon's motion for recusal. Other facts will be found in the discussion of the analytical component to which they relate.

Kolon's motion relies on the provisions of 28 U.S.C. § 455(b)(2), 28 U.S.C. § 455(a), and Canon 3 of The Code of Conduct for United States Judges. DuPont first argues that the recusal motion is untimely. It then responds to Kolon's arguments respecting § 455(b)(2), § 455(a), and Canon 3.

DISCUSSION

1. Section 455: General

The federal standards governing recusal of federal judges are found in 28 U.S.C. §§ 455 and 144.[7] In 1974, Congress amended § 455 in order to promote "public confidence" in the judiciary and make "the

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[5] And, the trial of the Trade Secrets Case had been concluded, judgment had been entered on the verdict, and proceedings were underway on several post-trial motions.

[6] Decision on those twelve motions, as well as four subsequently filed motions, was held in abeyance pending resolution of the recusal motion.

[7] Section 144 applies only to district judges and requires recusal "whenever a party" in a district court "files a timely and sufficient affidavit" demonstrating that the presiding judge has a "personal bias or prejudice" against or in favor of a party. Kolon has not moved for recusal under § 144, and that statute is not at issue here.

statutory grounds for disqualification of a judge ... conform generally with the ... canons of the Code of Judicial Conduct." H.R. Rep. No. 93–1453 (Oct. 9, 1974), 1974 U.S.C.C.A.N. 6351, 6351, 6360. Section 455(a), in its current form, provides that: "any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned." Such a circumstance "is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 850 (1988) (affirming the Fifth Circuit's decision and interpretation in *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796 (5th Cir. 1986)).

Under 28 U.S.C. § 455(b)(2), a judge is required to recuse himself "[w]here in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it." And, under § 455(e), "no justice, judge, or magistrate judge shall *accept from the parties* to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." (emphasis added).

Although the 1974 revisions to § 455 broadened the standard for recusal, Congress emphasized that those standards did not permit recusal unless the

parties presented a reasonable basis for disqualification. H.R. Rep. No. 93–1453 (Oct. 9, 1974), 1974 U.S.C.C.A.N. 6351, 6355. In that regard, the report advised that "[E]ach judge must be alert to the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision ... [l]itigants ... are not entitled to judges of their own choice." *Id.*

2. Timeliness of the Motion

DuPont argues first that the recusal motion should be denied because it was not timely made. Kolon takes the view that § 455(b) does not include a timeliness requirement, and that, because § 455(e) prohibits a judge from "accepting from the parties" a waiver of the grounds for disqualification, a timeliness requirement would be tantamount to a waiver. Kolon did not address directly whether a motion based on § 455(a) or Canon 3 is subject to a timeliness requirement, but in its discussion of Fourth Circuit decisional law on timeliness, Kolon implicitly acknowledges that such a requirement exists with respect to § 455(a). Kolon also contends that, in any event, its motion for recusal was timely, and that it waited so long to bring it because the issue was not ripe until DuPont filed its MOTION FOR PROTECTIVE ORDER on September 26, 2011 (Docket No. 59). Mem. Supp. Motion for Recusal at 26.

The language of § 455 is silent on the issue of timeliness. However, the majority of circuits, including the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Eleventh, and Federal Circuits have found that timeliness is a requirement when recusal is sought under § 455. *See, e.g. Oglala Sioux Tribe v.*

Homestake Min. Co., 722 F.2d 1407, 1414 (1st Cir. 1983) (finding that a timeliness requirement applies to both §§ 455(a) and 455(b)); *In re International Business Machines Corp.*, 618 F.2d 923, 928, 932 (2d Cir. 1980) (noting and expressing approval of previous case law interpreting § 455 as requiring timeliness); *Stone Hedge Properties v. Phoenix Capital Corp.*, 71 Fed. Appx. 138, 141 (3d Cir. 2003) (unpublished opinion) (finding that "settled authority" established a timeliness requirement under both §§ 455(a) and 455(b), citing to cases in the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits); *United States v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990) (*quoting Satterfield v. Edenton–Chowan Bd. of Ed.*, 530 F.2d 567, 574–75 (4th Cir. 1975) for the proposition that "timeliness [is] required in all recusal contexts"); *United States v. York*, 888 F.2d 1050 (5th Cir. 1989) (finding a timeliness requirement under both sections and noting that Congress understood that the " 'judicial gloss' on the former section 455 would be preserved and that a timeliness requirement was implicit"); *In re Kansas Pub. Employees Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996) ("[C]laims under § 455 will not be considered unless timely made."); *United States v. Conforte*, 624 F.2d 869, 879–80 (9th Cir. 1980) (finding a timeliness requirement in § 455); *Summers v. Singletary,* 119 F.3d 917, 920 (11th Cir. 1997) ("[T]imeliness is a component of § 455(b)"); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1418 (Fed. Cir. 1989) (finding that timeliness is one "factor" to be considered in the § 455 analysis).[8]

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[8] Although the opinion is unpublished, and thus not binding as precedent, the Seventh Circuit also has acknowledged that "some degree of timeliness is required" under § 455(b) in *United*

Contrary to Kolon's contention, timeliness is a requirement under § 455(b) in the Fourth Circuit. *United States v. Owens*, 902 F.2d at 1155–57. Kolon attempts to distinguish *Owens* by arguing that it addresses only § 455(a). That argument misapprehends *Owens* because, although the defendant in *Owens* did not specify which part of § 455 required recusal, the facts that formed the basis of his recusal motion fall squarely within § 455(b)(1). [9] Moreover, in *Owens*, the Fourth Circuit clearly explained that timeliness was required for all recusal motions, not just those falling under § 455(a). 902 F.2d 1154, 1155 (4th Cir. 1990). The Court took the view that promptness in filing recusal motions is necessary to prevent parties from holding back information relevant to recusal with the purpose of determining whether the presiding judge treats them the way that they want to be treated. *See id.* at 1156 (*quoting In re Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960)). To avoid this circumstance and the corresponding waste of resources (of the parties and the judiciary) and the unfairness (to the other party) that such waste entails, the Fourth Circuit requires the movant "to raise the disqualification of the trier ... at the earliest moment after knowledge of the facts." *Satterfield v. Edenton–Chowan Bd. of Educ.*, 530 F.2d 567, 574 (4th Cir.

States v. Lampe, 1996 WL 570558, at *3 (7th Cir. 1996) (unpublished). The *Lampe* decision, along with the other cited decisions, provides a useful analytical tool when evaluating the timeliness requirement.

[9] Section 455(b)(1) requires recusal when a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

1975). That fundamental rationale applies equally to both §§ 455(a) and 455(b).[10]

Kolon's argument concerning waiver under § 455(e) is also without merit. To begin, it is widely accepted that timeliness and waiver are two distinctly different issues. *See United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) (observing "that waiver and timeliness are distinct issues"); *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000) ("Waiver is a renunciation ... of the right to seek recusal [u]ntimeliness, on the other hand, is merely a failure to seek recusal when it should have been sought"); *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997) (noting the persuasiveness of *York's* analysis on the waiver and timeliness distinction); *Stone Hedge Properties v. Phoenix Capital Corp.*, 71 Fed. Appx. 138, 140–42 (3d Cir. 2003) (same); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasizing the difference between "forfeiting" a claim, by not timely asserting it, and "waiving" a claim, by intentionally relinquishing it and extinguishing the right to raise it). These decisions, standing alone, dispose of Kolon's theory that there is no distinction between timeliness and waiver.

That distinction, of course, is obvious from the text of § 455(e) which does not address timeliness but, instead, forecloses the ability of a judge to "accept

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[10] *See also United States v. Taggart*, 983 F.2d 1059, No. 92–6468, 1993 WL 10876, at *3–*4 (4th Cir. Jan. 21, 1993) (unpublished) (holding that a recusal motion brought under both §§ 455(a) and 455(b)(1) was untimely); *United States v. Sarno*, 41 Fed. Appx. 603, 608–09 (4th Cir. 2002)(unpublished) (holding that a recusal motion under § 455(b)(5)(ii) was without merit, in part because of its untimeliness). Unpublished opinions are not of precedential effect, but they can be useful analytical tools.

from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)," while allowing a judge to accept a waiver of a ground arising under subsection (a). Here, no party has asked the Court to waive any ground for disqualification in subsection (b) or in any other statute. Thus, by its terms, § 455(e) is not implicated here.

Moreover, Kolon's argument that the waiver prohibition forecloses a timeliness requirement ignores the statutory text of subsection (a) and the entirely different purposes served by the distinctly different concepts of the timeliness requirement and the waiver provision. To read § 455(e) as Kolon urges would frustrate the very purpose of a timeliness requirement and allow a party, with knowledge of a disqualifying circumstance, to lay in wait and spring the trap when doing so would provide a strategic advantage. Such a rule would foster great mischief.[11] Further, the result of such a rule would lead to the waste of party and judicial resources and to prejudice and unfairness to the adverse party.

Finally, to adopt Kolon's view of § 455(e) would be to ignore the well-considered opinions that reflect the decisions of every circuit to have considered the issue

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[11] *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (holding that a recusal motion was untimely and noting that, without a timeliness requirement, parties would be encouraged "to withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke section 455 in order to get a second bite at the apple"); *see also Belue v. Leventhal*, 640 F.3d 567, 574 (4th Cir. 2011) (noting that recusal motions should not be "a form of brushback pitch for litigants to hurl at judges who do not rule in their favor").

and that distinguish between waiver and timeliness. The Court declines the invitation to take that course.

Thus, the question to be decided is whether Kolon's motion is timely. It is not.

It was public knowledge when DuPont filed this case that the presiding judge had been a partner in McGuireWoods in the 1980's. And, after DuPont filed its Complaint, the Clerk's Office issued a notice (that is part of the electronic case file) which put counsel on notice of that fact as well.

Kolon has long known that Akzo sued DuPont in 1985 in this Court. The record is clear that Kolon scoured court records, including the judicial archives, for information about that case. Thus, Kolon has long known that McGuireWoods and FitzpatrickCella represented DuPont in the *Akzo* Case. In August 2010, Kolon received documents from FitzpatrickCella and the privilege log respecting those documents. An entry in that privilege log revealed the facsimile containing the *Akzo* Complaint and that it was sent by the presiding judge.

Kolon first requested discovery about the *Akzo* Case in the Trade Secrets Case in August of 2009. *See* Mem. Opp. DuPont's Motion *in Limine* to Preclude Kolon from Presenting Evidence at 4 (3:09cv58, Docket No. 515). The parties thereafter sparred over that discovery, and from August 2010 through May 2011, the parties litigated about whether statements made by a McGuireWoods partner in the *Akzo* Case evinced a waiver of secrecy of certain trade secrets at issue in the Trade Secrets Case. That issue was thoroughly briefed by the parties in the Trade Secrets Case during that period (3:09cv58, Docket Nos. 431, 432, 515, 539, 765, 782, 791, 947, 976, 1003),

culminating in Orders issued on March 23, 2011 (3:09cv58, Docket No. 961) and on May 16, 2011 (3:09cv58, Docket No. 1146).

All the while, Kolon knew that the presiding judge had been a partner in McGuireWoods in 1985 to 1986 when the *Akzo* Case was pending. And, it knew about the letter from Mr. Fitzpatrick to the presiding judge and the entry in the privilege log.[12]

In sum, before the trial in the Trade Secrets Case began on July 21, 2011, Kolon knew every fact on which it now predicates its recusal motion. In fact, the record clearly reflects that Kolon knew those facts as of the date of its receipt of the privilege log in August 2010.

Kolon, however, did not move for recusal. Rather, in a brief addressing a jury instruction filed on July 20, 2011, Kolon made an oblique comment about whether the presiding judge "should be adjudicating these matters." Kolon did not articulate what it meant by "these matters," but the context shows that the words referred to the issue whether an adverse inference should be drawn from the testimony of Edwin Schulz, a Kolon consultant, when he claimed a Fifth Amendment privilege rather than answering questions posed by Dupont's counsel.

On July 22, 2011, the Court asked Kolon's counsel what it intended by the reference in that brief. Kolon's counsel said that the comment was based on the entry in the privilege log, which contained the transmittal sent by the presiding judge to FitzpatrickCella with

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[12] In fact, Kolon listed that communication as one of its trial exhibits in the Trade Secrets Case (filed on April 11, 2011) (3:09cv58, Docket No. 1044 at 103, DX 5092).

the Complaint attached. July 22, 2011 Tr. 16. Kolon's counsel went on to state that it had received the document "months ago," but had not raised the issue because "getting that document was not something that, in my mind, would trigger, you know, any bias or anything like that." *Id.* at 17.

Nonetheless, DuPont was ordered to conduct an expedited review of the company and law firm billing records to determine if there was any other reference to the presiding judge. That was because, as the parties were told, the presiding judge has no recollection that he did any work on the *Akzo* Case and did not remember any request made by Mr. Fitzpatrick or sending a copy of Akzo's Complaint to him. But, in an abundance of caution, it was thought best to have the records reviewed to see if those recollections about a 25 year old case may have been in error.

The search of those records produced no new information. And, Kolon's counsel was informed by DuPont's counsel that the one document (the Fitzpatrick letter) identified earlier (3:09cv58, Docket No. 1044 at 103, DX 5092) was the only document referring to the presiding judge. The response to that letter was a cover sheet and a copy of the Akzo Complaint, but it did not mention the presiding judge. Thereafter, Kolon appeared satisfied and said no more. The trial of the Trade Secrets Case went forward to verdict and then into post-judgment proceedings. Those proceedings include DuPont's

request for an injunction the effect of which, says Kolon, would be to put it out of business.[13]

Nor did Kolon raise the issue at any time after the Antitrust Case returned from the Court of Appeals, was set on a discovery and trial schedule in April 2011, and proceeded with discovery from then until the end of October 2011, the discovery cutoff. In those intervening months, Kolon and DuPont have had, and have briefed (or have written letters about), many discovery disputes in the Antitrust Case which the Court has adjudicated.

Although fully knowledgeable of the facts that it now claims warrant recusal, Kolon said nothing. Indeed, even after it received on September 26, 2011, DUPONT'S MOTION FOR PROTECTIVE ORDER REGARDING KOLON'S RULE 30(b)(6) DEPOSITION NOTICE AND THIRD PARTY SUBPOENAS (Docket No. 59),[14] the motion which Kolon contends ripened the recusal issue in this case, Kolon said nothing. Briefing was expedited on DuPont's motion (Docket No. 69). A hearing was held on September 30, 2011, and because the briefs did not fully address the issues, further briefing was ordered. Kolon filed a mirror image cross-motion on the issue (Docket No. 139) and briefing on it was concluded by

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[13] Kolon did not file a motion for recusal in the Trade Secrets Case when it filed its November 30, 2011 motion in the Antitrust Case. It referred to recusal in the Trade Secrets Case in its recusal briefs in the Antitrust Case and in several post-judgment briefs in the Trade Secret Case. However, it did not file a recusal motion in the Trade Secrets Case until January 27, 2012. That motion will be resolved in a separate opinion.

[14] The Docket Number is the new numbering system in the Antitrust Case, *Kolon Industries, Inc. v. E.I. du Pont de Nemours and Company*, Civil Action No. 3:11cv622.

November 7, 2011. DuPont then filed another related motion for protective order (Docket No. 167) on which briefing was completed on October 31, 2011. In none of its papers did Kolon seek, or even mention, recusal.

Then, on November 30, 2011, Kolon filed this motion. On this record, the motion simply is too late.

Kolon seeks to avoid that obvious and necessary consequence by arguing that the issue of recusal only ripened because of DuPont's motion for protective order asking for an order precluding discovery into all the litigation between Akzo and Dupont, including the *Akzo* Case. That, says Kolon, is when the *Akzo* litigation became a matter in controversy. The so-called triggering motion was filed on September 26, 2011, two months before Kolon filed the recusal motion.

This belatedly asserted predicate of timeliness is without merit. As Kolon itself acknowledges, DuPont and Kolon have been at odds over the discovery into the *Akzo* litigation, including the *Akzo* Case, since at least August of 2010, or as Kolon puts it, since "the early stages of the litigation." Reply Mem. Supp. Motion for Recusal at 18.[15] In fact, the parties have really been at odds over this discovery since August of 2009 when Kolon raised it in the Trade Secrets Case.

And, counsel for Kolon admitted that the ground Kolon now asserts is its basis for recusal—the

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[15] For example, when the Court asked both parties to submit their Second Requests for Production of Documents in the Antitrust Case on September 1, 2011, Kolon submitted its filing dated August 25, 2009 in which it asked for "all pleadings, motions and filings with the court, and any settlement agreement relating to your patent litigations with Akzo." Second Request for Production of Documents ¶ 13.

Complaint forwarded by the presiding judge to Mr. Fitzpatrick—did not present any issue of bias. Counsel for Kolon explained that, even though he had known about the transmission of the Complaint for months, he had not brought it to the Court's attention because it did not trigger any bias in his mind. July 22, 2011 Tr. at 17. Kolon represented that its concern was that this facsimile did not constitute the only involvement of the presiding judge in the *Akzo* Case. Thus, with the Court's approval and at its direction, DuPont and Kolon conducted a search through all the documents related to that litigation. The search ultimately unearthed not a shred of new evidence linking the presiding judge to the *Akzo* Case. Having found no evidence aside from the document Kolon had already decided did not implicate bias (a document that it had held knowledge of since August of 2010), Kolon appeared satisfied, and the proceedings continued.

It is unclear what precisely prompted Kolon belatedly to come to a contrary view on November 30, 2011. Perhaps, it was that Kolon regarded as persuasive the briefs filed by DuPont addressing its motion for protective order. Or, perhaps, it was that Kolon apprehended that it was facing a serious prospect that an injunction might be issued in the Trade Secrets Case. Given Kolon's terse, but repeated, suggestions in its recusal papers in this case about vacatur of orders in the Trade Secrets Case, it may be that Kolon has had second thoughts about whether it should have moved for recusal in 2010. It really makes no difference because DuPont's motion for protective order simply was not an event that suddenly made ripe an issue the pertinent facts of which Kolon had known for over a year and about which the parties had

sparred and litigated for many months before that motion was filed.[16]

Having concluded that the motion for recusal is untimely, it perhaps is not necessary to consider the merits of the motion. And, indeed, generally, it is preferable to articulate a single basis for decision and, conversely, to refrain from making alternative holdings. *Karsten v. Kaiser Found. Health Plan of the Mid–Atlantic States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1994). However, considering the nature of the recusal issue, it seems preferable here also to address the merits of the issue.

Kolon's motion is based principally on § 455(b)(2), but it also invokes § 455(a) and, derivatively, Canon 3 of the Code of Conduct for United States Judges. The discussion will proceed in that order.

3. Section 455(b)(2)

The statute provides that a judge must recuse himself from presiding over a case "[w]here in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter or such lawyer has been a material witness concerning it [the matter in controversy]." 28 U.S.C. § 455(b)(2). Kolon argues that § 455(b)(2) requires recusal here because two of the presiding judge's former law partners represented

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[16] Kolon's unusual "triggering event theory" cannot rescue its dilatory conduct for an additional reason. Kolon, with full knowledge of the allegedly disqualifying information for a year or more, waited two more months after the putative "triggering event" before raising recusal. Under the circumstances, there is no valid reason for waiting two months to file a recusal motion. That too renders its motion untimely.

DuPont in the *Akzo* Case and because the presiding judge was a partner at McGuireWoods when those partners represented DuPont in that case. Kolon takes the view that evidence concerning the *Akzo* Case may be relevant in this case. Mem. Supp. Motion for Recusal at 16.

It is Kolon's burden, as the party moving for recusal under § 455(b), to demonstrate that the presiding judge or one of his former law partners "served in the matter in controversy." *See United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998) (dismissing the defendant's § 455(b) argument after noting that he had failed to show that the judge's former law partners or the judge himself served in the "matter in controversy"). Kolon has not met that burden. Thus, even if Kolon's motion were timely (which it is not), recusal would not be warranted under § 455(b)(2) because neither the presiding judge nor his former law partners served as a lawyer concerning the "matter in controversy" in this case.

Kolon primarily relies on *In re Rodgers*, 537 F.2d 1196, 1197–98 (4th Cir. 1976) and *United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998). In *Rodgers*, the defendants were charged with violating mail fraud and anti-racketeering statutes. 537 F.2d at 1197. One of the presiding judge's former law partners had represented the owners of Pimlico racetrack in formulating a position on legislation that affected operation of racetracks in Maryland and in making an offer to purchase another racetrack. The judge knew nothing of the representation which continued after the judge left the firm.

In *Rodgers*, the record established that the presiding judge's former law firm and his client would

be called to testify about events that took place before the judge left the law firm. This was said to be in aid of the defense that the defendants' conduct was no more culpable than that of the clients of the judge's former partner. The United States acknowledged that such evidence would be relevant. Holding that "matter in controversy" included the defense to be offered, the Fourth Circuit held that the record in *Rodgers* required recusal under § 455(b)(2).

In *United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998), the Fourth Circuit again applied § 455(b)(2) and, in doing so, the Court relied, in part, on its decision in *Rodgers*. As in *Rodgers*, the Court of Appeals in *DeTemple* examined the facts of the specific case, and explained that the statute should be applied in perspective of the nature and extent of the connection between the judge's prior professional association and the case then before him. *Id.* at 284. Then, the Court of Appeals, when identifying the matter in controversy, looked at the degree of attenuation between the prior case in which the judge's partners were involved and the case over which the judge was then presiding. *Id.* at 285. And, while acknowledging that there was some overlap in the two cases, the Fourth Circuit held that: "DeTemple has failed to show that the [matter which involved the former partner] concerned the case against him in more than a tangential way."

In deciding *DeTemple*, the Fourth Circuit cited with approval the decision of the Eighth Circuit in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 839 F.2d 1296, 1302 (8th Cir. 1988) for the proposition that "issues in dispute must be 'sufficiently related' to constitute parts of same matter

in controversy." *United States v. DeTemple*, 162 F.3d at 286. In the text cited by the Fourth Circuit, the Eighth Circuit had held:

> Even if we accept appellant's argument that different cases may constitute the same "matter in controversy" ... the question of what kinds of cases are sufficiently related for the purposes of § 455(b)(2) would remain a question of judgment and degree. We cannot say that the trial judge's former law partner's submission of an *amicus* brief in a case involving, to a large extent, different issues and different remedies two decades ago requires recusal under § 455(b)(2), nor do we believe that Congress intended such a result.

Little Rock Sch. Dist., 839 F.2d at 1302. Also, in *DeTemple*, the Court of Appeals explained that the fact "that two suits might have some facts in common [is] not controlling on whether they qualify as the same matter in controversy." *United States v. DeTemple*, 162 F.3d at 286.[17]

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[17] *See also United States v. Walton*, 56 F.3d 551 (4th Cir. 1995) (finding that a judge who had worked at a law firm representing the defendant in marijuana-related cases approximately 20 years prior to the defendant's current indictment for marijuana-use could preside without violating §§ 455(a) or (b) because the judge's connection to the defendant was "attenuated"); *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003) ("[A] presiding judge need not recuse himself simply because he possesses some tangential relationship to the proceedings."); *Horatio Clark Ford, III v. Bank of America*, No. 99–2368, 2000 WL 1028238, at *2, 2000 U.S. App. LEXIS 18109, at *5–6 (10th Cir. 2000) (unpublished table decision) (noting that a "district judge's association with the defendant's law firm almost twenty-five years before the filing of this case d[id] not provide reasonable

The instructions of the Fourth Circuit on those points guide the inquiry to be made here. And, those principles necessitate the conclusion that the admissibility in the Trade Secrets Case of documents from the *Akzo* Case and the discoverability of documents from the *Akzo* Case in this case do not involve the same matter in controversy.

To begin, the cases are really quite different in nature. In the *Akzo* Case, Akzo sued DuPont for patent infringement. This case alleges violations of the antitrust laws. It cannot be disputed that the elements of patent infringement claims and antitrust claims are quite different.[18] In like fashion, the elements of the claims in the Trade Secrets Case and the Antitrust Case are very different.

Kolon argues, in its recusal briefs, that the *Akzo* Case and this case are the same matter in controversy because DuPont's enforcement of its patents for Kevlar is some evidence of intent to monopolize. It should be noted initially that Kolon's SACC makes no

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grounds to question his impartiality" and finding no violation of either §§ 455(a) or (b)); *Hoffenberg v. United States*, 333 F. Supp. 2d 166, 175 (S.D.N.Y. 2004) (noting that the "significance of the relationship between the merits of the pending action and the purported basis for recusal is a crucial factor in determining whether the pending action and the allegations underlying the recusal motion involve the same matter in controversy") (citations omitted).

[18] Kolon often uses the term "the *Akzo* litigation" (referring to numerous different patent cases) in places other than Richmond. Kolon, however, does not contend that McGuireWoods was involved in any way in those other cases. The § 455(b)(2) analysis does not encompass any case other than the *Akzo* Case filed in this Court in 1985 and presided over by another judge of this Court.

such allegation.[19] Nor, contrary to Kolon's assertions, did the Fourth Circuit point to any patent enforcement litigation by DuPont as evidence of monopolistic intent.[20] Thus, as a threshold matter, the premise upon which Kolon bases its matter in controversy argument has not been joined as an issue in the case. It is, of course, axiomatic that the mere argument of counsel in briefs is not sufficient to place a matter in issue in a pleading.

But, even if Kolon had alleged that DuPont's enforcement of its patents was a part of some unlawful monopolistic scheme, or was evidence thereof, that would not make the admissibility of evidence from the 1985 *Akzo* Case in the Trade Secrets Case the same matter in controversy as whether information from the *Akzo* Case is discoverable in this case. To begin with, it must be remembered that Akzo filed the *Akzo* Case against DuPont, not vice versa. That alone, of course, vitiates the viability of the notion that the *Akzo* Case was some part of a monopolistic scheme initiated by DuPont. Yet, that is precisely the

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[19] In paragraph 17 of the SACC, Kolon does allege that DuPont's market position was protected by several patents, but that is a far cry from alleging unlawful patent enforcement.

[20] On that subject, the Fourth Circuit did note that Kolon had "alleged various actions undertaken by DuPont over time to protect its dominant market position, including: successfully seeking and obtaining a lien against imports of certain para-aramid fibers into the United States; 'scar[ing] off others in the industry through track disputes; and fighting the U.S. International Trade Commission's revocation of antidumping duties on para-aramid fibers." *E.I. DuPont & Co. v. Kolon Industries, Inc.*, 637 F.3d at 453. But, the Court of Appeals never mentioned any patent infringement action filed against or by DuPont. Nor, for that matter, do Kolon's briefs in the Fourth Circuit mention the topic.

attenuated connection on which Kolon presses for recusal.

If Kolon could overcome that rather fundamental defect in its argument, it would nonetheless have to present some evidence that, in the *Akzo* Case, DuPont was engaged in the unlawful enforcement of its patents. Kolon has made no such showing. Nor could it.[21] In fact, Kolon's recusal papers make no showing of how discovery about the *Akzo* Case might help it prove the Antitrust Case, making only generalized, conclusory assertions. Nor has Kolon explained how McGuireWoods' representation in the *Akzo* Case might tend to show DuPont's monopolistic intent.[22]

The best that can be said is that there may be some attenuated connection between the *Akzo* Case and this one. But, in fact, Kolon has not even shown that the two suits have facts in common. Moreover, the issue presented in the Antitrust Case by DuPont's motion for protective order and Kolon's reciprocal motion to compel is simply whether the information about or from the *Akzo* Case is discoverable. That is really quite different than whether DuPont waived the secrecy of trade secret information in the *Akzo* Case. And, even if one could find a linkage, it would be too tangential and attenuated to be the same matter in controversy.

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[21] Although, in the *Akzo* Case, DuPont asserted a counterclaim against Akzo, it was based on a theory of non-infringement and invalidity and did not rely on a claim that Akzo had infringed a DuPont patent. *Akzo N.V. v. E.I. DuPont de Nemours and Co.*, 635 F. Supp. at 1352–55.

[22] How Kolon might be able to take discovery of DuPont's counsel about the *Akzo* Case has not been explained either. Again, Kolon supports its point with conclusory and vague allegations.

On this record, it cannot be said that Kolon has met its burden to show that recusal is called for under § 455(b)(2).[23]

4. Section 455(a)

Kolon suggests that recusal under § 455(a) is appropriate because the record is unclear respecting McGuireWoods representation of DuPont in the *Akzo* Case and the Court's role therein. Mem. Supp. Motion for Recusal at 29–30. Kolon's reply brief barely addresses § 455(a), and, even then, only in vague and conclusory terms. Reply Mem. Supp. Motion for Recusal at 15–16.

Two preliminary matters will be addressed before addressing § 455(a). First, the record does not reflect that McGuireWoods or the presiding judge had any role in the so-called *Akzo* litigation that Kolon says occurred in Delaware and several foreign countries. According to the record, McGuireWoods, along with FitzpatrickCella, was counsel for DuPont in the case filed by Akzo against DuPont in 1985 in this Court.

Second, the record ought to be clear by now that the presiding judge has no recollection of any participation in the *Akzo* Case, and his lack of participation has been confirmed by a review of all available files and Court records, notwithstanding that the presiding judge did forward Akzo's Complaint against DuPont to Mr. Fitzpatrick (although the

[23] Kolon's opening brief portends the need to depose two of the presiding judge's partners. Its reply brief simply says that depositions may be taken. That remote and speculative prospect is simply not enough to invoke the testimonial component of § 455(b)(2).

presiding judge has no recollection of having done that).

Section 455(a) provides that: "any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned." Before it was amended in 1974, § 455(a) only required a judge to disqualify himself "in any case in which he ha[d] a substantial interest." Congress amended § 455(a) in order to promote "public confidence" in the judiciary and make "the statutory grounds for disqualification of a judge ... conform generally with the ... canons of the Code of Judicial Conduct." H.R. Rep. No. 93–1453 (Oct. 9, 1974), 1974 U.S.C.C.A.N. 6351, 6351, 6360.

A. The Standard To Be Applied

In *Liljeberg*, the Supreme Court affirmed the Fifth Circuit's "construction of § 455(a)," finding that a violation of the statute "is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality." *Liljeberg*, 486 U.S. at 850. Thus, § 455(a) applies to those situations where a "reasonable person" would believe that the judge *actually knew* about the disqualifying interest at issue.[24]

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[24] See also *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 132 (2d Cir. 2003) (examining whether "a reasonable person would believe that the district judge knew he had a financial interest in a party to the litigation at some point before the decision on the merits" to determine whether there was a violation of § 455(a)); *Davis v. Xerox*, 811 F.2d 1293, 1296 (9th Cir. 1987) ("[I]f a reasonable person would conclude from all the circumstances that the judge did not have knowledge at the time he sat, his rulings stand.").

"The determination of whether such an appearance has been created is an objective one based on what a reasonable person knowing all the facts would conclude." *Chase Manhattan*, 343 F.3d at 127 (citing *Liljeberg*, 486 U.S. at 860–61). The analysis assumes that a reasonable person not only knows all the relevant facts, but also understands them. *See Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985). In weighing recusal, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality simply might be trying to avoid what they apprehend may be an adverse ruling. *See In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

The general standard set out in § 455(a) "is not intended to be an invitation for judges freely to disqualify themselves whenever their impartiality is questioned on any ground." *Hauptmann v. Wilentz*, 555 F. Supp. 28, 31 (D.N.J. 1982). As one expert on disqualification put it in hearings on the bill that became § 455(a):

> I want to make loud and clear for purposes of this record, because I assume that this record may have importance for many, many years in the future, that this does not mean that judges are going to be casually getting off the bench or that somebody can march up to a judge and say, 'Well, I just don't feel comfortable with you. I wish you would go away. I question your impartiality.' This is not to happen at all.

Hearings on S. 1064 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of

the House Comm. On the Judiciary, 93rd Cong., 2d Sess. 14–15 (1974) (remarks of John P. Frank, Esq., Phoenix, Arizona, *author of Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43 (1970); *Disqualification of Judges*, 56 Yale L.J. 605 (1949); *Commentary on Disqualification of Judges*, 1972 Utah L. Rev. 377).

Another expert observed at the same hearing:

> [T]he longer the judge is on the bench, the less the likelihood that the general standard [of Canon 3(c)(1), which became 28 U.S.C. § 455(a)] will require his disqualification because of his former association [as former partner or former associate with a lawyer appearing before him].

Hearing on S. 1064 Before the Subcomm. On Improvements in Judicial Machinery of the Senate Comm. On the Judiciary, 93rd Cong. 1st Sess. 100 (1973) (remarks of Professor E. Wayne Thode, reporter for the ABA Committee on Standards of Judicial Conduct).

To apply the standard set by *Liljeberg*, it is appropriate to identify the facts that would be known to, and understood by, a reasonable person. Kolon, the party with the burden to establish that recusal is appropriate, has made the following points:

First, says Kolon, two of the presiding judge's partners represented DuPont in the *Akzo* Case along with another law firm at a time when the presiding judge was a partner. Second, the participation of the presiding judge in that case is unclear.

That view of the record, however, rather substantially misapprehends what the record shows

about what the reasonable person would know. It is more accurate on the first point to say that a reasonable person would know that, more than twenty-five years ago, at a time when the presiding judge was a partner in McGuireWoods, two other partners in that firm represented DuPont in a case in which it had been sued for patent infringement and which did not involve the antitrust laws. As to the second point, the reasonable person would know that, at the request of FitzpatrickCella, the presiding judge sent to that firm a copy of the Complaint that Akzo had filed against DuPont, and the presiding judge responded by having the Complaint sent.

The reasonable person also would know that the presiding judge has no recollection of participating in that case. The reasonable person would know that, therefore, the presiding judge directed DuPont and McGuireWoods to review their files and records and those of FitzpatrickCella to determine if there was any indication that the presiding judge had participated in the *Akzo* Case, and that the ensuing review confirmed that nothing in the files reflected any such participation.

The reasonable person also would know and understand that, at most, there is an attenuated, tangential connection between this case and the *Akzo* Case.

The reasonable person would know and understand that, with full knowledge of the facts that Kolon now says necessitate recusal, Kolon's counsel, on July 22, 2011, said that getting the letter from Mr. Fitzpatrick "was not something that, in my mind, would trigger, you know, bias or anything like that." July 22, 2011 Tr. at 17. Of course, it would be known

as well that, at the time counsel made that statement, counsel was fully aware that McGuireWoods represented DuPont in the *Akzo* Case in 1985 and that, in 1985 and 1986, the presiding judge had been a partner in McGuireWoods. The reasonable person would also know that Kolon did not thereafter file a motion for recusal in the Trade Secrets Case or the Antitrust Case and that the presiding judge thereafter presided over a seven week trial of the Trade Secrets Case and resolved numerous discovery motions in the Antitrust Case.

A reasonable person would not be able to conclude that there was a disqualifying circumstance or, even if there was, that the presiding judge actually knew about it. Thus, there would be no basis for recusal under § 455(a). Kolon cites no decision in which, on a record such as this, it has been held that recusal is required by § 455(a). Nor has any such authority been located by the Court. The record here would not afford the basis for a reasonable person to question the presiding judge's impartiality, much less to believe that the presiding judge has at any time herein known of any basis for disqualification.

Because § 455(a) conforms with Canon 3 of the Code of Conduct for United States Judges, the foregoing analysis of § 455(a) would apply to resolve a challenge under Canon 3. In any event, that challenge too, for reasons previously stated, would be untimely.[25]

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[25] Kolon is correct to point out that, under § 455 as opposed to § 144, judges have an obligation to identify the existence of grounds for recusal themselves "rather than requiring recusal only in response to a party affidavit." *See Liteky v. United States*, 510 U.S. 540, 548 (1994). However, if a judge does not identify

5. Vacatur

The decision not to recuse makes it unnecessary to address the issue of vacatur of previous orders in this case.

CONCLUSION

For the reasons set forth above, Kolon's MOTION FOR RECUSAL AND DISQUALIFICATION (Docket No. 247) will be denied.

It is so ORDERED.

/s/ REP

Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: February 21, 2012

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such grounds, any party with knowledge of a basis for recusal must file a timely motion asking for disqualification. *See e.g.*, *United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000).

Nor can § 455 possibly be read to require judges to identify grounds for recusal when they are unaware that such grounds exist, or where there, in fact, is no basis for recusal. Moreover, where, as here, a possible ground was obliquely raised by a party and it was discussed and inquired into fully, and the party did not pursue it further, a judge reasonably would conclude that no ground existed. That is especially true where the party's counsel has said—after raising the point—that he knows no basis for "bias or anything like that."

APPENDIX C

FILED: April 3, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1587
(3:11-cv-00622-REP)

KOLON INDUSTRIES INCORPORATED

Plaintiff – Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY

Defendant – Appellee.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX D

FILED: May 23, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1587
(3:11-cv-00622-REP)

KOLON INDUSTRIES INCORPORATED

Plaintiff – Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY

Defendant – Appellee.

ORDER

Upon consideration of submissions relative to the motion to stay mandate, the court grants the motion.

Entered at the direction of Judge Diaz with the concurrence of Judge Shedd and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

UNITED STATES CODE

TITLE 28. Judiciary and Judicial Procedure
PART I. Organization of Courts

CHAPTER 21. General Provisions Applicable to Courts and Judges

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his

household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means 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, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was

assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.