UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 19-3935, *In re: AmerisourceBergen Drug Corp, et al*
Originating Case No. : 1:17-md-02804

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Amy E. Gigliotti
Case Management Specialist
Direct Dial No. 513-564-7012

Enclosure

No mandate to issue

No. 19-3935

UNITED STATES COURT OF APPEALS
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In re: NATIONAL PRESCRIPTION OPIATE LITIGATION

In re: AMERISOURCEBERGEN DRUG CORPORATION, et al.,

Petitioners.

O R D E R

Before: CLAY, McKEAGUE, and DONALD, Circuit Judges.

Petitioners—sixteen manufacturers, distributors, and pharmacies involved in multi-district litigation arising from the alleged over-prescription of opioid medications—seek a writ of mandamus to compel the recusal of the Honorable Dan A. Polster under 28 U.S.C. § 455(a). Petitioners argue that Judge Polster's in- and out-of-court statements show he has prejudged liability and is pursuing a personal mission; his statements and support for settlement create an appearance of impropriety; and his significant involvement in settlement negotiations prohibit him from trying the case. Petitioners also move to expedite a decision and to stay district court proceedings pending a ruling on their petition. We deny the mandamus petition and deny the other motions as moot.

"[M]andamus relief is an extraordinary remedy[.]" *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008) (quoting *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997)). "Traditionally, writs of mandamus were used 'only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *In re*

Prof'ls Direct Ins. Co., 578 F.3d 432, 437 (6th Cir. 2009) (quoting *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976)).

But we may also consider a mandamus petition following denial of a motion to recuse. *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc). The standard for recusal is codified by statute: a district court judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This is an objective standard, "ask[ing] what a reasonable person knowing all the relevant facts would think about the impartiality of the judge." *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980). We review the denial of a motion to recuse for an abuse of discretion. *Decker v. GE Healthcare Inc.*, 770 F.3d 378, 388 (6th Cir. 2014). Thus, we ask "not whether [we] would have decided as did the trial court, but whether the trial court decision cannot be defended as a rational conclusion supported by a reasonable reading of the record." *In re City of Detroit*, 828 F.2d 1160, 1167 (6th Cir. 1987) (per curiam) (quoting *In re Cooper*, 821 F.2d 833, 834 (1st Cir. 1987) (per curiam)), *overruled in part on other grounds by In re Aetna Cas. & Sur. Co.*, 919 F.2d at 1140–43. "We must uphold the district court's recusal decision unless we have 'a definite and firm conviction that the trial court committed a clear error of judgment.'" *Bell v. Johnson*, 404 F.3d 997, 1006 (6th Cir. 2005) (quoting *Youn v. Track, Inc.*, 324 F.3d 409, 422 (6th Cir. 2003)).

At the outset, the timeliness of a motion to recuse is a factor meriting consideration. *In re City of Detroit*, 828 F.2d at 1167–68. Recusal motions should normally be made "at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987); *cf. City of Cleveland v. Krupansky*, 619 F.2d 576, 577 (6th Cir. 1980) (per curiam) (noting that disqualification was not sought in a complex antitrust suit until it had been pending for almost five years, following a "multitude of proceedings [that] had been conducted before the Judge resulting in many rulings, memorandum opinions and orders"). "A prompt application affords the district judge an

opportunity to assess the merits of the application before taking any further steps that may be inappropriate for the judge to take." *In re Int'l Bus. Machs. Corp.*, 45 F.3d 641, 643 (2d Cir. 1995). It also "avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters." *Id.*

Here, the timing of Petitioners' recusal motion doesn't help them. The bulk of the facts Petitioners cite to support recusal were known to them well before they sought recusal. Judge Polster spoke to the press beginning in early 2018. He has been involved in settlement discussions since the beginning of the litigation. The settlement and abatement issues have been pending for months. In any case, we will assume that Petitioners' request for recusal is timely and address Petitioners' substantive arguments.

Petitioners challenge Judge Polster's public comments to the press and the bar about this litigation and his purported prejudgment of liability in in- and out-of-court statements. Judges should avoid public comment on the merits of cases pending or impending before them. *United States v. Microsoft Corp.*, 253 F.3d 34, 112 (D.C. Cir. 2001). A judge improperly comments on the merits of a case when he publicly "disclose[s] his views on the factual and legal matters at the heart of the case[,] . . . the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth." *Id.* More limited public comment might also support recusal. *See In re Boston's Children First*, 244 F.3d 164, 167−71 (1st Cir. 2001); *Int'l Bus. Machs. Corp.*, 45 F.3d at 642−43; *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993). More general statements, however, do not require recusal. *See United States v. Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976). Nor do mere beliefs about a judge's state of mind. *See Cooley*, 1 F.3d at 993; *see also Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913, 914 (2004) (Scalia, J., in chambers) ("The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." (citation omitted)).

Read in isolation, Judge Polster's statements to the press and in court might call into question his impartiality. But we must take his statements in context. Judge Polster equally placed blame on all parties, readily acknowledged that settlement efforts might not work, and acknowledged that both sides had compelling arguments. He granted interviews to some papers, in which he discussed the general impact of the opioid epidemic and his desire to settle the action. But those articles also discussed his penchant for settlement in all cases and his refusal to discuss the particulars of this case. Mindful that we review the decision below for abuse of discretion, we can't say we have a firm conviction that Judge Polster's statements "constituted a clear error of judgment." *Bell*, 404 F.3d at 1006. While we may not have chosen to make the statements, grant the interviews, or participate in the programs that form the basis for this petition, particularly in a case of such enormous public interest and significance, and while we do not encourage Judge Polster to continue these actions, we nevertheless conclude that Petitioners have not established that they are entitled to a writ of mandamus requiring Judge Polster's recusal on the basis of this conduct.

Petitioners also seek recusal based on Judge Polster's stated preference for a settlement and his participation in settlement negotiations despite being responsible for crafting any abatement remedy. "A favorable or unfavorable predisposition can . . . deserve to be characterized as 'bias' or 'prejudice' [when] even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render a fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994). In this type of situation, recusal is required if the judge's remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555. Thus, recusal is highly dependent on the facts of the case. *Compare United States v. Young*, 45 F.3d 1405, 1415−16 (10th Cir. 1995) (finding recusal unnecessary when judge's comments reflected his belief that a defendant was likely to be convicted if she went to trial because "[n]othing in the remark indicates that the judge was unable or unwilling to carry out his

responsibilities impartially"), *with United States v. Antar*, 53 F.3d 568, 573−74 (3d Cir. 1995) (requiring recusal when the judge announced during sentencing that his object from the outset of trial was to get money back for the public which had been taken as the result of defendant's fraud), *overruled on other grounds by Smith v. Berg*, 247 F.3d 532, 534 (3d Cir. 2001).

That Judge Polster believed that settlement was the best option does not display bias. He pushed for settlement not because he had prejudged the case, but because that was the most expedient way to conclude the dispute. *See Bell*, 404 F.3d at 1006. Judges in complex litigation are encouraged to pursue and facilitate settlement early in a variety of ways. *See* Manual on Complex Litigation § 13.1, pp. 167−68 (4th ed. 2004). As recognized by the Judicial Panel on Multidistrict Litigation, Judge Polster had prior experience in multidistrict litigation. That he would recommend settlement as the best option in this case, or push its pursuit, does not evidence prejudicial attitudes on the merits that would require him to recuse himself.

The mandamus petition is **DENIED** and the motions to stay and to expedite are **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk