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6 UNITED STATES BANKRUPTCY COURT
7 DISTRICT OF ARIZONA
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In Re	)	Chapter 7
EDWARD J. BALL, JR.,	)	Case No. 03-14674-GBN
Debtor.	)	ORDER

The debtor has authored a pleading seeking the court's recusal from his case and related adversaries and removal as a United States Bankruptcy Judge. This order will endeavor to deal only with the recusal request.[1]

Recusal is justified either by actual bias or the appearance of bias, measured by whether a reasonable person with knowledge of all the facts would conclude the judge's impartiality might reasonably be questioned. 28 U.S.C. §455(a). Judicial rulings and remarks not based on an extrajudicial source almost never constitute a valid basis for recusal. Fundamentally it is a question of degree. Disqualification is warranted only when judicial rulings and remarks, not based on extrajudicial sources, rise to such a high degree of favoritism or antagonism as to make fair judgment impossible. *In re Fraschilla,* 235 B.R.449, 459 (9th Cir. Bankr. 1999), *aff'd*

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1 As to the latter demand, for the record, the undersigned will refuse to fire himself. This aspect of the caption reads: "REMOVAL OF JUDGE GEORGE B. NIELSEN AS FEDERAL BANKRUPTCY JUDGE FOR CONSPIRACY, FRAUD, MAIL FRAUD, WIRE FRAUD, PERJURY, BIAS, UNPROFESSIONAL CONDUCT, FAILING TO REPORT FELONIES AS REQUIRED BY LAW, VIOLATION OF CIVIL RIGHTS, HOBB'S ACT VIOLATIONS, AND A RICCO ENTERPRISE DIRECTED AND ENCOURAGED BY MR. NIELSEN." Pleading *id.* at p.1.

242 F. 3d 381 (9th Cir. 2000), citing *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994).

When reviewing bankruptcy judge denials of recusal motions, appellate courts test whether a reasonable person with knowledge of all the facts would conclude the judge's impartiality might reasonably be questioned. *In re Focus Media, Inc.,* 378 F.3d 916, 929 (9th Cir. 2004). In explaining the extrajudicial source doctrine, the Supreme Court noted:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.
> *Liteky,* 510 U.S. at 555, 114 S.Ct. at 1157.

There is no impartially, favoritism or antagonism when the trial judge requires competent, admissible evidence that is probative of the essential elements of the requested relief from the party. *Fraschilla,* 235 B.R. at 459-60.

In the present case, debtor is not demanding recusal based on an extrajudicial source. Instead, the pleading targets trial court rulings. Given that judicial rulings alone seldom constitute a valid basis for a bias motion, debtor bears a heavy burden in establishing a deep seated, unequivocal antagonism that makes fair judgment impossible. *Liteky, id.*

THE EXECUTORY LEASE AND DEBTOR'S SCHEDULES

First, under a "conspiracy" and "perjury" rubric, debtor cites a December 16, 2004 order denying reconsideration of an order rejecting a lease. The nonresidential leasehold was located in Oxnard, California. Order at administrative docket item ("dkt.") 167. The landlord filed a motion for the bankruptcy estate to either assume or reject the lease. As the order notes, during the December 6, 2004 hearing, the trustee and the landlord agreed the lease should be rejected and the automatic stay lifted to allow the landlord to recover the premises. Debtor's only option, if he wished to preserve the lease for his own private benefit, was to negotiate an

arrangement with his landlord. *Id.* at p. 2. Instead debtor filed a motion for reconsideration. Dkt. 166.

In denying reconsideration, this court observed:

> Debtor's reconsideration motion again invokes allegations of trustee mismanagement. This blame game doesn't work. First, it's not at all clear that the trustee is at fault regarding the lease. Debtor had a legal obligation to file complete and accurate schedules, including identifying all unexpired leases in Schedule G. 11 U.S.C. section 521(1). Order at dkt. 167, p. 2.

The court continued:

> Identification of unexpired non-residential leases is particularly important. Debtors and trustees have only 60 days from the bankruptcy filing to move to assume such contracts. Failing to timely assume results in the lease being deemed rejected. The premises are then to be immediately returned to the lessor.... The trustee was not appointed until September 24, 2003, with less than 30 days remaining to assume. Dkt. 16. It's unclear if the trustee had knowledge of the existence of the lease in the remaining time. It is also unclear, assuming the trustee had knowledge, whether he had the resources to assume the lease by promptly curing all arrearages, as the law requires....
>
> It is clear however, that debtor knew of the lease, as he was occupying the premises and paying the rent. Neither he nor the trustee attempted to timely assume. It's unknown whether anyone is at fault in the lease rejection. If there is someone to blame, as debtor wants to believe, this doesn't prevent rejection. No one timely assumed. The law says the lease is rejected.... Debtor's motion is denied. *Id.,* at pgs. 2-3 (footnote omitted).

According to the debtor the above statement in the order is pure fabrication and contradictory to "the evidence." Motion at p. 6. Debtor's "evidence" is contained in pgs. 8-16, *id.* His argument appears to be that his partial filings of documents and discussions with the trustee should have provided sufficient hints to encourage the trustee to mount an investigation to determine whether there were executory leases in existence, whose assumption would benefit

estate creditors. Pgs. 13-16, *id.* It is unusual to require trustees to make such a search. Executory contracts and leases are to be specifically identified in Schedule G at the very inception of the case. 11 U.S.C. §521 (1), Official Bankruptcy Form Six at Schedule G.

Any required lease investigation, of course, must have concluded in the first 30 days after the trustee's appointment, as that was the time left to assume. 11 U.S.C. §365 (d) (4). Debtor undercuts his own argument by incorrectly claiming "...debtor listed the lease as an executory contract in Schedule G, just as the law required." P. 16. Obviously, had debtor timely filed a properly completed Schedule G, identifying an unexpired lease, the trustee would not have to conduct an investigation to determine if any existed. But debtor did no such thing. It was the **trustee** who identified the lease in the trustee's Schedule G, filed December 3, 2003, well after the assumption period had run. Dkt. 54 at schedule G. This fact was previously directed to debtor's attention in the order of December 16, 2004. *See* dkt. 167 at p. 3, fn.1. The court also made debtor aware of this fact at the hearing on December 6, 2004. Minutes of hearing at p. 2, dkt. 161.

The lease was deemed rejected when no one moved to assume it in the first 60 days of the case. Debtor himself recognizes this: "And if executory, it expired when your wonder boy did not assume in the first sixty days[2] (see In Cochise College Park, 703 F.2d 1339." [*sic*], P. 15 *id.* Since no one timely assumed, the court was required to deem the lease rejected and deny debtor's motion for reconsideration.

To state in connection with this ruling, that debtor did not comply with his duty to file schedules is not bias. It is a fact. Debtor's failure to file complete schedules and statements

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[2] If debtor is referring to the trustee, debtor is in error. The trustee could **not** have moved to assume the lease (assuming debtor had timely identified it in Schedule G) in the first 60 days of the case. The trustee was not appointed until September 24, 2003, providing less than 30 days to discover the lease, decide it would be an estate benefit and acquire the financial resources to cure arrearages to allow assumption, or request an extension of time to assume or reject. Dkt. 16-17, 167 at p.3.

led to dismissal of the bankruptcy on September 19, 2003. Dkt. 13. The case was reinstated and a trustee was ordered to be appointed on September 22, 2003. Dkts. 15, 25.

It's unclear what the fuss is about. It appears debtor understands the lease cannot be assumed, since no one timely filed an assumption motion. Motion at 15. So there is no possibility his motion for reconsideration could be legally granted. The order also made clear: "It's unknown whether anyone is at fault in the lease rejection." Dkt. 167 at P.3. It is an article of faith with debtor that the trustee knew/should have known about the existence of the business lease. Motion at 9, 11-16. Fine. Trustee certainly did not file an assumption or extension motion during the fewer than 30 days left. Debtor likewise didn't file such motions during the initial 30 days when he was the debtor in possession. During this time, it was **debtor's** responsibility to monitor and timely assume or reject business leases. 11 U.S.C. §1107 (a).

Would it have been wise to assume the California lease? Phrased differently, did the loss of the lease hurt creditors? None objected. The lease's value to the estate is unknown, but apparently was of little value to the Phoenix-based trustee. His December 3, 2003 Schedule G indicates his plan was "...to move out of the office the end of the year or no later than the first quarter of 2004." Schedule G, dkt. 54. Apparently this didn't happen. The landlord subsequently complained no rent had been paid since June of 2004, although debtor continued to occupy the premises. This is well after the period when the trustee announced he would surrender the lease. Minutes of December 6, 2004 hearing, dkt. 161. *Also see* landlord's motion to compel assumption or rejection at p. 2, dkt. 145.[3] These rent arrearages would have to be paid, to allow assumption. 11 U.S.C. §365 (b) (1).

It's unknown if the estate at that time had sufficient cash to pay back rent. It's equally unknown whether assumption of this lease by the estate would have been a good business decision. According to the landlord, it was the debtor who had been occupying the premises, as

[3] The landlord also agrees that debtor did not list the lease in his bankruptcy schedules or statements. Motion, *id,* at p. 2.

a month to month tenant, until defaulting. Dkt. 145, *id.* Any timely motion must establish the benefit to the estate and creditors, not just to the debtor, to use estate money for lease assumption. This is because, when serving as the estate representative, debtors in possession and trustees owe a fiduciary duty to creditors and the estate to conserve assets and maximize creditor recoveries. *Kalyna v. Swaine (In re Accomazzo),* 226 B.R. 426, 429 (D. Az. 1998), §1107 (a) *id*. No such motion was filed. Accordingly there's no showing in the record that rejection damaged the estate at all, much less that the trustee bears more "fault" than does debtor.

The order denying debtor's motion for reconsideration is not a basis for recusal.

DEBTOR'S SUIT AGAINST THE TRUSTEE AND TRUSTEE'S COUNSEL

Debtor filed an adversary complaint to *inter alia,* remove the case trustee and trustee's attorney. Adversary proceeding 05-00735. He now argues the court was intentionally misleading in dismissing counsel from the litigation. Motion at 20.[4] Debtor appears to argue that by order of October18, 2005 debtor was allowed to sue trustee and his counsel. Thereafter counsel was dismissed from suit. Debtor ascribes this result to bias. *Id.* The court's ruling and reasons were announced at the January 12, 2006 hearing. Adversary ("adv.")Dkts. 16-17, 19. The matter is under appeal by debtor. Adv. dkt. 20.

The October order states in part:

> 3.) The September 28 order required issuance of three summons, based on debtor's identification of three defendants in his caption: the trustee, trustee's counsel and counsel's law firm... If debtor now wishes to proceed solely against the trustee and counsel in their individual capacity, then only two summons and complaints need be served. Adv. dkt. 6, pgs. 2-3.

The earlier September 28 order attempted to cure certain of the *pro se* complaint's deficiencies. It dismissed *sua sponte,* a corporation and the bankruptcy estate as

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[4] He also asserts, without any supporting evidentiary foundation that counsel is a personal and very close friend of the court. *Id.* As to the latter accusation, while both counsel and debtor may well be fine fellows, neither are counted among the court's few friends.

plaintiffs, (given debtor's lack of standing to represent them). It also dismissed all employees of counsel's firm, as fictitious defendants and authorized issuance of three summons and complaint copies for service by debtor on the three remaining defendants he identified. Adv. dkt. 2, at pgs. 1-2.

The notion that a court can subsequently dismiss parties initially permitted to be named as defendants is not a"...complete reckless abandonment of [the court's] instructions throughout the case." Recusal motion at 21.

Indeed, the court specifically noted in the September 28, 2005 order:

> Certainly the 70 page complaint is not "... a short and plain statement of the claim showing that the pleader is entitled to relief...." Rule 8 (a) (2), *F.R.Civ. P.* The pleading is also internally inconsistent. *See* complaint at 3 (emphasizing that the pleading is <u>not</u> an adversary complaint). These and other pleading issues can be addressed, if necessary, through subsequent motion practice.
> Order at 1, fn. 1. Dkt. 246.

In fact, pleading issues were soon addressed in a motion to dismiss by defendants. Dkts. 8-10. A briefing order was entered and oral argument scheduled. At the hearing, the court provided debtor, who failed to file a written response, an additional opportunity to respond. Minutes of January 12, 2006, adv. dkt. 17, hearing transcript at pgs. 34-35, adv. dkt. 16. However, the court also noted:

> One issue that I think I can dispose of right now is whether to dismiss the Collins Law Firm as a defendant. Given that debtor's complaint focuses only on removal of the trustee and the trustee's counsel, I think Mr. Collins' firm should be dismissed, because the firm is not a proper party to such a claim; see a Nevada case in re Davis 312 BR 681 at 690 [*sic*]. Instead, as I'm going to note in just a minute, Section 324A of Title 11 applies only to trustees.
> Transcript, *id.* at pgs. 35-36.

The court subsequently entered an order that dismissed not just the law firm, but counsel as well–clearly a sore point with debtor as noted on p. 21 of his motion and presumably

in his pending appeal. Order of January 24, 2006, adv. dkt. 19. While it's a pity the rapidly aging trial judge referred only to the law firm and not specifically to attorney Collins in the transcript, the legal reason for dismissal of both counsel and his firm are identical: "...the Trustee's Attorney is not a proper party to such a claim and will be dismissed from the proceeding." *Lisowski v. Davis (In re Davis),* 312 B.R. 681, 690 (Bankr. D. Nev. 2004). The reason for this result in an 11 U.S.C. §324 (a) action is that if debtor succeeds in removing the trustee, counsel's removal is automatic: "If the Trustee is removed, the successor trustee will be free to employ the attorney of his or her choice." 312 B.R. at 690. No prejudice to plaintiff debtor results from the dismissal. As the trustee's agent, relevant acts of counsel can be attributed to the trustee in the removal litigation.

Following established case law in dismissing counsel and his firm from debtor's adversary is not a basis for recusal.

STEPPING ASIDE AS TRIAL JUDGE AS A POTENTIAL WITNESS

Debtor asserts the court must recuse itself because debtor filed a witness list identifying the judge as a witness in adversary 05-00243[5]. This adversary was brought by the trustee seeking denial of debtor's discharge pursuant to 11 U.S.C. §727 (a). Complaint at adv. dkt. 1. Debtor has big plans for the court:

> Judge Nielsen will become the Debtor's most important witness, and we be [*sic*] voir dired as to his expert knowledge as a Bankruptcy Judge and an expert on Bankruptcy Law-then, this Debtor is going to have Nielsen's lunch, treating him as an adversarial and hostile witness. Mr. Nielsen will be on the stand for weeks, eight hours per day. Judge Nielsen will find that the docket he controls, and his own words and Orders will come back to haunt him-for the rest of his life.
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> Vindication will be the Debtor's solace in this sordid affair of wrong doing by Judge Nielsen.

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5 Actually debtor didn't file a witness list. However, he did identify the judge and others as his witnesses in a discovery motion, which the plaintiff trustee filed as debtor's witness list. Adv. dkt. 14.

Motion at 23.

The assertion that the court is "...Debtor's most important witness..." in defending his right to a bankruptcy discharge is cited without factual basis or authority. It is **debtor's** alleged wrong doing that is the focus of the trustee's complaint. *See* adversary complaint at first cause of action, alleging debtor intentionally hindered or delayed the trustee in liquidation of the Selleck note, second cause of action alleging a refusal to testify, third, fourth and fifth causes of action alleging failure or refusal to keep, maintain or provide certain pre-petition business records. Adv. dkt. 1. At trial, if plaintiff establishes a *prima facie* case, debtor must then explain his out of court actions or non actions, not indict others. The court was not a witness to these matters and has no knowledge of any facts relevant to this adversary, outside of those in the record . *See U.S. v. Kanahele,* 951 F. Supp. 928, 944-45 (D. Haw. 1996) (District Judge denies recusal when he was not a witness to any facts not already within the record).

A litigant cannot manufacture a conflict of interest as a source of recusal bias. It must actually be likely that the judge will be called upon to evaluate the judge's own testimony to prompt disqualification. Unsubstantiated speculation that the jurist will be required to be a material witness concerning a disputed issue is insufficient to require recusal. *U.S. v. Salemme,* 164 F. Supp 2d 49, 78 (D. Mass. 1998). An allegation that a judge may be a material witness does not automatically require disqualification. *Kanahele, id.* at 945. Since there is no showing this court was a witness to relevant facts outside of the record, there are no grounds for recusal merely because debtor announces an intention to call him as a witness.

THE ORDER OF OCTOBER 19, 2004

On October 19 of 2004, the court entered the following order in the administrative bankruptcy file:

> Enough. Debtor's attempted filings of October 15 continue his practice of unfocused, abusive and profane papers, coupled with the occasional veiled threat of physical harm. His abuse is principally on the trustee and counsel, who are attempting to

finish projects debtor started and pay creditors he didn't.

Although debtor purports to be detecting crimes, he refuses to meet with law enforcement officers, whom he also threatens. He complains about court rulings, but never prosecutes an appeal. Most importantly, debtor never appears in Court to offer evidence in support of his allegations and subject himself to cross examination. Nothing is served by his sad exercise.

The court is specifically empowered, on motion or its own initiative, to protect against scandalous or defamatory material that arises during a bankruptcy. Rule 9018, *F.Br.R.* Persons within the court's jurisdiction should not be subject to scandalous or defamatory material, submitted under the guise of a properly pled and supported court document. Every court has supervisory power over its own records and files. Access has been denied where court files might have become a vehicle for improper purposes. Courts refuse to permit their files to serve as reservoirs of libelous statements. *Phar-Mor Inc. v. Defendants named under seal,* 191 B.R. 675, 678-80 (Bankr. N.D. Oh. 1995).

The instant papers will not be filed by the clerk, as either legal pleadings or legitimate correspondence. In reality they are neither. The papers are struck and will be discarded. All further pleadings by debtor will meet the standard imposed on all parties to this case: stating with particularity
the relief requested and the legal and factual support for entitlement to the relief. Rule 9013. Hearings will be conducted on properly constituted motions. Rule 9014. Papers not meeting this standard will be struck and discarded.
Order at dkt. 143, administrative bankruptcy file 03-14674.

Subsequent to this order, debtor filed an acceptable pleading that was allowed. Dkt. 147. On November 15 of 2004, the court struck an unacceptable pleading and an *ex parte* letter, but allowed the filing of a second motion. Order at dkt. 158. Debtor's motion for reconsideration was allowed to be filed on December 13, 2004. Dkt. 166. An attempted *ex parte* contact with the court by debtor was refused on March 22, 2005. Dkt. 199. Debtor's affidavit was

allowed to be filed on April 4, 2005. Dkt. 208. Additional pleadings of debtor have been allowed, when they met the requirements of the October order. *See* dkt. 230. The same procedure applies to the pending adversaries, when debtor files an acceptable pleading, it is allowed. *See e.g.* order of February 28, 2006 at p. 2 in adversary 05-00243. Adv. dkt. 25.

Debtor argues:

> Actions have already been taken to hide the mismanagement, the bias, the embarrassment of Judge Nielsen. He has refused to file accurate and truthful motions of the Debtor - stating they are defamatory or slanderous. Sorry, allegations in themselves are always defamatory and slanderous, except when they are backed up by the truth. This Debtor's motions have been, and still are true, and yet, Judge Nielsen, in an unprecedented bias against the Debtor, has refused to file them out of embarrassment for him.
> Motion at 23.

The October order was entered only after debtor's own writings[6] made it necessary to do so. The order amply describes the reason for the action. The sanction is no broader than needed: when debtor files pleadings lacking vituperative, profane personal attacks on parties, they are filed. He's been reminded of this in court. Transcript of April 4, 2005 at pgs. 17-24. Dkt. 215. Recusal on this basis is denied.

CONCLUSION AND ORDER

The recusal motion is denied. Debtor's arguments focus on rulings that are supported by the facts and the law and are not the result of bias. A judge is not disqualified by a litigant's intemperate and scurrilous attacks upon the court. *U.S. v. Studley,* 783 F. 2d 934, 940 (9th Cir. 1986). This is not the first time the court has dealt with challenging litigation circumstances. *In re Jansen,* 107 B.R. 249 (Bankr. D. Az. 1989). This is not the first judge to receive intemperate personal attacks from this party. *See* dkt. 14 (Three page *ad hominem* attack on the domestic relations judge hearing debtor's pending divorce).

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6 A pretty good argument could be made that the court should have acted sooner. *See* dkts. 14, 127, 139-140, administrative bankruptcy file.

The court will continue to bear in mind that illness may be complicating the situation.[7] Relatively late in life, debtor is confronted with the loss of his business, loss of his marriage and ill health. These are difficult circumstances. The court is sympathetic. Sympathy, however, cannot justify abuse of others or of the legal process. Sympathy cannot permit delay or denial of the trustee's right to have his complaint heard in trial. The recusal motion is denied.

The above has sufficiently quoted portions of debtor's motion to allow an understanding of its tone and lack of evidentiary support. In addition, the motion charges a party with knowingly operating "...a RICCO enterprise...." *Id.* at p. 3. It declares a party "...can only be compared with Osama Bin Laden, dangerous, cunning, evil, prejudicial, biased, a criminal, a terrorist, and, ... [*sic*] and, what will be proven before this fight is over, a killer....more dangerous than all of Al Quida put together." *Id.* at 4. "For the Debtor to list every time...lies, perjures himself...." *Id.* at p. 19. The pleading fails to meet the standard of the order of October 19, 2004. It will not be filed, but will be discarded.

ORDERED ACCORDINGLY.

GEORGE B. NIELSEN, JR.
UNITED STATES BANKRUPTCY JUDGE

Copies mailed this 5th
day of April, 2006, to:

Daniel P. Collins
COLLINS, MAY, POTENZA, BARAN & GILLESPIE
2210 Bank One Center
201 N. Central Avenue
Phoenix, AZ 85073-0022
Attorney for David A. Birdsell

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7 Transcript of May 6, 2005 at debtor's statement, pgs. 16-19, Adv. dkt. 7 of Adv. 05-00243.

1 Edward J. Ball, Jr.
16438 W. Central Street
2 Surprise, AZ 85374
Debtor Pro Se
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By /s/Rachael M. Stapleton
4 Judicial Assistant
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