

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHER DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Chapter 11
)	
LEVEL PROPANE GASES, INC., <i>et al.</i>)	Case No. 02-16172
)	Jointly Administered
Debtors.)	
_____)	Randolph Baxter
)	
WILLIAM H. MALOOF,)	Adversary Proceeding No. 09-01127
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN)	
ADMINSTRATOR,)	
)	
Defendant.)	

**DEFENDANT’S MEMORANDUM IN OPPOSITION
TO PLAINTIFF’S MOTION TO RECUSE WITH
SUGGESTION OF REFERRAL TO UNITED STATES
ATTORNEY FOR INVESTIGATION**

Defendant Mark Uhrich (the “Plan Administrator”), the plan administrator of the Consolidated Estate of Level Propane Gases, Inc. (“Level Gases”) and its affiliated debtors and former debtors in possession in these jointly administered cases, hereby opposes the Motion to Recuse (the “Motion”) filed by plaintiff William H. Maloof’s (“Malooof”). In that Motion, Maloof makes the scurrilous and incredible allegation that this Court was a participant in a “scheme” initiated in October 2000 – eighteen months prior to the commencement of the underlying bankruptcy proceedings – to rob, cause the insolvency and seize the going concern assets of Level Propane. He bases this allegation solely on what he characterizes as “email traffic” supposedly found in files contained on a DVD he apparently provided to a “consultant.”

According to Maloof, his mere allegation of such participation predicated on these purported electronic messages is sufficient alone to require the Court's recusal under 28 U.S.C. § 455(a).

As demonstrated below, the Motion should be denied for the simple reason that there is no competent, admissible evidence of the Court's participation in such a "scheme" or the "scheme's" actual existence. Absent such evidence, Maloof's accusations are nothing more than uncorroborated and baseless allegations, insufficient to justify recusal under the statute. No reasonable, objective person could conclude that the fantastical conspiracy posited by Maloof actually took place without such evidence. Indeed, the purported "email traffic" proffered by Maloof is of such dubious character as to raise a reasonable doubt as to its authenticity and authorship. Accordingly, the Plan Administrator urges the Court to deny the Motion and suggests that the Court consider referring this matter to the United States attorney for this district to investigate the genuineness and source of the purported electronic messages.

LAW AND ARGUMENT

A. The Motion Must Be Denied As Being Frivolous And Without Merit.

Recusal under section 455(a) is required only if it shown that "a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *United States v. Hartsel*, 199 F.3d 812, 820 (6th Cir. 1999) (quoting *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir.), cert. denied, 498 U.S. 980, 111 S.Ct. 508 (1990)). Under this statute, "[a] judge is presumed qualified to hear a proceeding and the movant has the burden of proving otherwise." *In re Betts*, 165 B.R. 233, 238 (Bkrtcy. N.D.Ill. 1994) (citing *Idaho v. Freeman*, 478 F.Supp. 33 (D.Idaho 1979)). See also *McCann v. Communications Design Corp.*, 775 F.Supp. 1506, 522 (D.Conn. 1991) ("[T]here is a substantial burden on the moving party to show that the judge is not impartial."); *In re X-Cel, Inc.*, 61 B.R. 691, 694 (N.D.Ill. 1986) (party

moving for recusal has the burden of producing facts which would raise significant doubt that justice would be done in the case). “[C]onclusions, rumors, beliefs, and opinions are not sufficient to form a basis for disqualification.” *General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1043 (6th Cir. 1990) (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)). “Frivolous and improperly based suggestions that a judge recuse should be firmly denied.” *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (citing *City of Cleveland v. Krupansky*, 619 F.2d 576 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980)).

Malooof utterly fails to satisfy his burden in seeking the Court’s recusal. The materials he relies on in making his scandalous and improbable charges do not rise to even the level of rumor, constituting unauthenticated and inadmissible hearsay of the worst sort. An examination of the three sets of documents he relies upon demonstrates the absence of any evidentiary basis for his accusations and the ultimate frivolity of the Motion.

First, Malooof asserts that he “received a letter from an expert consultant, Ex. 1, which confirmed the authenticity of certain PST files, known as JV.PST and JV2.PST” and that these PST files contained the purported “email traffic” on which he bases his allegations. (Motion at ¶ 6). To the extent this unsworn letter is being offered for the truth of the matters asserted therein, it is hearsay. *See Fed.R.Evid. 801(c)* (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”). It has absolutely no probative value and is simply inadmissible. Moreover, it does not even say what Malooof claims it says. It says nothing about the “authenticity of certain PST files” but simply refers to “the two PST files we previously recovered from John Caldwell’s DVD.” (See Ex. 1 to Motion). No statement is made that the document that Malooof contends to be “email traffic” among various individuals in 2000 and 2001 is any such thing. *See*

Fed.R.Evid. 901(a) (authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims”). Indeed, the letter does not even say that this purported “email traffic” was found on “John Caldwell’s DVD.”

Adding to the unreliability of the unverified assertions contained in the letter is the fact that the author of the letter – the purported “expert consultant” – is merely reporting what he claims to have been told by an unidentified “colleague.” According to the letter, the “two PST files . . . recovered from John Caldwell’s DVD” were “examined” not by the consultant who allegedly authored the letter but by this unknown “colleague.” The latter’s supposed statements regarding the “examination” he conducted and the “recovered message” that “caught his eye,” even if they were probative of Maloof’s allegations, are themselves inadmissible hearsay.

Second, Maloof proffers his own affidavit in which he avers that “the email traffic [sic] hereto as Exhibit ‘A’ is authentic in that it is found in the same PST files that have been previously authenticated and which authentications are matters of record in this Court.” (Exhibit 2 to Motion at ¶ 3). He does not aver that this assertion is based on personal knowledge or give any indication as to how he could possibly know that the purported “email traffic” was found in a “PST file.” There are simply no facts suggesting that Maloof is in anyway competent to testify about the source or “authenticity” of the supposed “email traffic” attached to his affidavit. It would appear that this statement is, at best, based on what Maloof was told by his attorney about what his “expert consultant” may have told the attorney about what the consultant may have been told by his unidentified “colleague” about what may be on “John Caldwell’s DVD.” Absent any indication to the contrary, it constitutes hearsay layered on hearsay layered on hearsay layered on hearsay.

Furthermore, Maloof's statement confuses the "authenticity" of the proffered document with that of the file in which it was supposedly found. The Plan Administrator is unaware of any prior ruling by the Court that any "PST files" are "authentic" or that any such "authentication" is a matter of record in this Court. But this assertion, in any event, simply begs the question. Even if one assumes that the purported "email traffic" attached to the Maloof affidavit could be found on the "two PST files recovered from John Caldwell's DVD" – an allegation unsupported by any admissible evidence – such "fact" would say nothing about the authenticity of that specific document.

This leads to the purported "email traffic" itself. As an initial matter, even if this material were somehow otherwise admissible, it cannot be used to evidence this Court's involvement in a "conspiracy" or even the existence of a conspiracy. Maloof bases his allegations in this regard solely on the statements purportedly made by John Rudd ("Rudd") in the proffered document. Setting aside for the moment the lack of any proof that Rudd actually made any of these statements, Fed.R.Evid. 801(d)(2) expressly provides that the contents of a statement by a "co-conspirator of a party" are not sufficient to establish "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered. . . ." "[A]bsent *some* independent, corroborating evidence of defendant's knowledge of and participation in the conspiracy, the out-of-court statements [of a purported co-conspirator] remain inadmissible." *United States v. Clark*, 13 F.3d 1337, 1341-42 (6th Cir. 1994) (emphasis in original). Such evidence must be "enough to rebut the presumed unreliability of hearsay." *Id.* at 1342. No such evidence is cited by Maloof.

Even if this were not the case, there is absolutely no competent, admissible evidence before the Court as to the source, authorship or authenticity of this supposed "email traffic."

There is, in short, no evidence that the incredible “scheme” alleged by Maloof ever existed, let alone that this Court was somehow involved in such scheme. The Court can best determine whether this unwarranted and unsubstantiated attack on its integrity requires action beyond the denial of the Motion. *See* Ohio Prof.Cond.R. 8.2(a) (“A lawyer shall not make a statement . . . with reckless disregard as to its truth or falsity concerning the . . . integrity of a judicial officer”); Fed.R.Bankr.P. 9011(c)(1)(B) (court may direct attorney to show cause why he has not violated subdivision (b) with respect to specific conduct). It should be plain that the Motion is entirely improper and should never have been filed since, in the absence of any evidentiary proof, there is no basis upon which a “reasonable, objective” person could come to question the Court’s integrity. As has been noted by the court in *In re Erickson.*, 107 B.R. 222, 224 (Bkrtcy.D.Neb. 1989), “[t]he appearance of a conflict of interest is not created by the assertion of a frivolous claim against a judge.” Groundless allegations of what would amount to criminal conduct by this Court should be treated no differently. Maloof’s effort to besmirch the Court’s integrity for his own strategic purpose without any evidentiary basis must be rejected.

B. An Independent Investigation As To The Genuineness And Authorship Of The Purported “EMail Traffic” Proffered By Maloof Is Warranted.

Pursuant to 18 U.S.C. § 3057, the Court has the authority to refer matters to the United States attorney for investigation if it has reasonable grounds for believing that such an investigation should be conducted to determine whether a violation of any of the criminal bankruptcy statutes contained in title 18 of the United States Code has occurred. The Plan Administrator submits that the Court should consider such a referral to determine the genuineness and authorship of the document referred to by Maloof as the “email traffic” and attached to his affidavit as Exhibit A. This document, on its face, contains and exhibits indicia of

being manufactured and falsified by a person or persons unknown with the purpose and intent of influencing the administration of the underlying chapter 11 proceedings. *See* 18 U.S.C. § 1519.

In the first instance, the “scheme” allegedly outlined in this document is so implausible, indeed fantastical, as to be beyond belief. One need look no further than the alleged participation of the Court in this “scheme” to understand its entirely far-fetched nature. How the supposed participants could have known, much less “planned,” in October 2000 that this Court would be assigned the Level Propane cases some eighteen months later when such assignment was by “automated random draw” under L.R. 1073-1(a) is simply inexplicable. The very list of supposed participants appears to be drawn up after the fact, there being no evidence suggesting that these individuals even knew each other or had any involvement with or knowledge of Level Propane or LTV Steel, the other supposed “target” of the scheme in the fall of 2000. The only reasonable inference is that this document was concocted to fit some outlandish conspiratorial theory that attempts to explain why Level Propane and its affiliated companies ended up in bankruptcy.

Further, various statements contained in the document are incomprehensible in light of known facts and events. For example, the last “message” contained in the document is purportedly from John Verbos (“Verbos”) and dated February 16, 2001, in which he purportedly inquires “about the status of LP and LTV” and supposedly asks Rudd “who will get the date and begin the process of bankruptcy.” As the Court is well aware, LTV Steel had filed its chapter 11 petition in December 2000, two months before this “message” was supposedly created. It is inconceivable how the person supposedly charged with obtaining “live data” from this entity and who had “a full accounting of all [its] monies” would have been unaware of this fact.

An independent investigation of the electronic records that purportedly contain this document is also recommended by the circumstances surrounding the document's disclosure. As the Court will recall, other "newly discovered" electronic messages supposedly derived from PST files in the possession of Jonathon Caldwell and supplied to Maloof have previously been proffered in the underlying chapter 11 proceedings. (See B.R. 3348: Motion to Vacate Pursuant to R. 60(b)(2) the Court's Decision of February 28, 2008 Denying Motion to Vacate Agreed Conversion Order and Sale Order). Verbos, the alleged author or recipient of those purported messages, denied, under penalty of perjury, writing or receiving any of them. (See B.R. 3365: Objection of John Verbos to William H. Maloof's Motion to Dissolve Protective Order Relating to John Verbos at Ex. A, Declaration of John Verbos). Nearly a year ago, on July 18, 2008, the Court ordered the turnover of all electronic files in Maloof's possession within five days. (B.R. 3376: Order Directing Turnover of Debtors' Records). That turnover has not occurred, preventing both the Plan Administrator and the Court from determining the authenticity and authorship of the "messages" purportedly contained in those files. Yet Maloof has apparently sent at least a portion of those electronic records to a "consultant" to be "recovered" and now bases scandalous allegations of what would constitute potentially criminal conduct on the part of the Court on the existence of nine year-old "messages" allegedly contained in those records.

In sum, the Plan Administrator suggests that there are reasonable grounds for the Court to believe that an investigation should be conducted by the United States attorney for this district to determine whether the "email traffic" proffered by Maloof has been falsified with the intent of influencing the administration of the underlying chapter 11 proceedings.

CONCLUSION

For the reasons and authorities cited herein, the Plan Administrator respectfully request that Maloof's Motion to Recuse be denied and that he be granted such other and further relief as the Court finds to be just and equitable.

Dated: Cleveland, Ohio
June 11, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2009, a copy of the foregoing Memorandum was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/Mark A. Phillips _____

Mark A. Phillips

One of the Attorneys for the Plan Administrator