

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

In Re:	)	Case No. 02-16172
Level Propane, Gases, Inc., et. al.	)	
Debtors.	)	Ch. 11
	)	
*****	)	Hon. Randolph Baxter
William H. Maloof,	)	
Plaintiff	)	Adv. Pro. Case No. 09-1127
	)	
Vs.	)	
	)	
Mark Uhrich, Plan Administrator	)	
of the Consolidated Estate of	)	
Level Propane Gases, Inc.	)	
Defendant	)	

**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS  
MOTION TO RECUSE  
28 U.S.C. Sec. 455, Bank. R. 5004**

Now comes the Plaintiff to the above-styled action and for his Supplemental Memorandum in Support of his Motion to Recuse, states as follows:

**INTRODUCTORY STATEMENT**

The Defendant Administrator has forcefully responded to Plaintiff’s Motion to Recuse, calling the basis for this Motion a “scurrilous and incredible allegation.” He attacks the Motion on the ground that it is frivolous in that “The materials he relies on in making his scandalous and incredible charges do not rise to even the level of rumor, constituting unauthenticated and inadmissible hearsay of the worst sort,” Defendant’s Memorandum at 3. The Defendant Administrator then proceeds to attack the evidence on two fronts: first, that the Rudd statements in 2000 and 2001 were somehow fabricated, as such are an insupportable fraud, and, second,

even if the statements were actually made, they are doomed as hearsay that cannot be saved as evidence, arguing that there is no corroborative evidence that would permit its admission under Evid. R. 801(d)(2)(E). The Plaintiff will argue below that the Defendant Administrator's arguments are without merit, and to the extent that additional evidence is to be made available, such evidence will be made available to the court well before this matter is to be heard.

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**THE PLAINTIFF HAS PRESENTED A SUFFICIENT BASIS FOR  
RECUSAL UNDER 28 U.S.C. §455**

Any analysis of recusal in the bankruptcy court must begin with a view of 28 U.S.C. §455, which in paragraph (a) provides: Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Here, if the Rudd statements are taken at face value, the impartiality of this judge might reasonably be questioned, so long as the cautions in *Hinman v. Rogers* 831 F.2d 931 (10<sup>th</sup> Cir, 1987) are kept in mind:

We must also consider petitioner's claims of bias and prejudice under 28 U.S.C. § 455, which is considerably broader in scope, while lacking in procedural hurdles. *Franks v. Nimmo*, 796 F.2d 1230, 1234 (10th Cir.1986); *United States v. Hines*, 696 F.2d at 728. The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality. *United States v. Hines*, 696 F.2d at 728. See also *United States v. Page*, 828 F.2d 1476, 1481; *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir.1982), *cert. denied*, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983); *United States v. Gigax*, 605 F.2d at 511.

Under this section, factual allegations *do not have to be taken as true*. *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir.1986); *United States v. Balistreri*, 779 F.2d 1191, 1202 (7th Cir.1985); *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1019-1020 n. 6 (5th Cir.1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982). *Nor is the judge limited to those facts presented by the challenging party*. *Idaho v. Freeman*, 507 F.Supp. 706, 721, 723 (D.Idaho 1981) (judge considers all circumstances, both public and in hidden view); *Gilbert v. Little Rock*, 722 F.2d at 1399, at 939, emphasis supplied.

Taking *Hinman*, *supra*, as a touchstone, the procedure under §455 is apparent: a party brings

to the court's attention certain matters that bear on its impartiality. The court considers those matters, together with the knowledge that the court has on its own to determine whether its impartiality might reasonably be questioned. A careful reading of the Rudd statements of 2000 and 2001 only indicates that Rudd claims "RB" as a participant in the conspiracy. The Plaintiff has claimed no more than Rudd's statements provide. This Court knows its involvements, and the Plaintiff does not presume to speak for this Court. However, it is incumbent upon the Court to consider the Rudd statements in light of its own knowledge of the circumstances. Unlike the adversarial procedures that characterize litigation, in which the Court assesses evidence brought before it to decide matters to which the Court is a stranger, both by circumstance and design, a Motion to Recuse is addressed to the Court's own conduct and the Court's own knowledge. This email traffic is indeed vivid and disturbing. The Plaintiff has not made any claim that Rudd's claims establish anything more than that he claims that "RB," a judge in this Court will arrange to preside over the Level Propane Bankruptcy which he intends to arrange. Whether this "RB," a judge in this Court, was in fact planning with John Rudd to arrange that Level Propane be put into bankruptcy proceedings over which he would preside, is another matter, since all of the relevant facts are not available. As discussed below, however, enough of the relevant facts, including rulings of this Court, are available so that whether this Court's impartiality might reasonably be questioned under 28 U.S.C. §455.

When the Second Circuit was asked to decide a Mandamus Petition which asked the same question, it granted the writ requiring recusal, observing:

"A judge is required to recuse "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a) (1988), and "the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts,*" *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988)

(emphasis in original), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989).

Somewhat less clear is the extent to which the objective view of a judge's impartiality may be predicated, at least in part, on judicial rulings. Whatever doubts on this score might have previously existed, they have been substantially dispelled by the Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). The Court explained that the "extrajudicial source" limitation applies to section 455(a), *id.*, 510 U.S. at ----, 114 S.Ct. at 1156, but cautioned that the limitation is a significant "*factor*," rather than a significant "*doctrine*," *id.*, 510 U.S. at ----, 114 S.Ct. at 1157 (emphasis in original), and that "there is not much doctrine to the doctrine." *Id.* Furthermore, the Court pointed out that the ultimate inquiry is whether circumstances satisfy section 455(a), *i.e.*, create an objectively reasonable basis for questioning a judge's impartiality, by showing "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* "[J]udicial rulings alone," the Court observed, "almost never constitute valid basis for a bias or partiality motion" and "can only in the rarest circumstances evidence the degree of favoritism or antagonism required." *Id.* But these very expressions of a strict standard allow for the possibility that "in the rarest circumstances" judicial rulings alone can warrant recusal, and can surely do so when accompanied by extrajudicial actions," *In Re International Business Machines*, 45 F.3d 641, 643-644 (2d Cir, 1995), accord *In Re Waller* 331 B.R. 489 (M.D., Ga., 2005).

Plaintiff addresses below the competence of the email evidence, based on the hearsay rule set out in E.R. 801(d)(2)(E). If this evidence of Rudd's statements comes in, which Plaintiff maintains it ought, then a reasonable person, under the case law developed interpreting 28 U.S.C. §455, knowing all the facts and circumstances, could reasonably question the Court's impartiality and recusal is in order.

The Defendant Administrator also complains that the Rudd statements are supported by a letter from a consulting expert that is unsworn and that no definition of a "PST" file is provided. These shortcomings arose from the necessity to act quickly, as the statute demands, especially here where a Motion to Dismiss is pending and a hearing was scheduled in the very near term, see *City of Cleveland v. Krupansky*, 619 F.2d 576, 577-578 (6<sup>th</sup> Cir., 1980). At the outset, the Plaintiff observes that these claims are John Rudd's and no one else's, and that to hold such explosive matters in reserve, as if playing a game of poker, is inappropriate in just the way observed in the *Krupansky* case. Moreover, this motion is addressed to the

Court's sound discretion, discretion that commands the Court, as the Defendant Administrator has said, to firmly decline frivolous and improperly based suggestions, *Krupansky, supra, Maier v. Orr* 758 F2d 1578, 1583 (Federal Circuit, 1985.) Here, however, there has been little delay on the one hand, in contrast to *Krupansky*, and the statements of John Rudd cannot be readily refuted by reference to public records or public office on the other, as in *Maier*. Thus, in this case, each party must struggle with his private conscience to take the just and appropriate public stand. The Plaintiff has elected to act promptly and in good faith to bring these disturbing matters to the Court's attention, in full recognition that the Court's decision with respect to these matters is within its sound discretion. The Defendant's argument that the Rudd statements are hearsay may be dispelled by reference to matters already of record in this Court, as argued below. What the Court makes of the Rudd statements is clearly for the Court to decide, but Plaintiff maintains that these statements must come in as evidence for the Court's consideration.

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**THE MATERIAL PRESENTED, CORROBORATED BY OTHER EVIDENCE,  
MATERIAL AND CONDUCT OF RECORD, AS SUCH, CONSTITUTES AN  
ADMISSIBLE EVIDENTIARY BASIS FOR THE MOTION  
UNDER Fed. R. Evid. 801(d)(2)(E).**

When the A Defendant Administrator objects to the emails traffic offered in support of Plaintiff's Motion to Recuse on the basis that it is uncorroborated hearsay, and hence inadmissible and incompetent as evidence, he objects despite the record in this court, which is replete with corroboration of both the conspiracy and what may be this Court's role in it. Whether the Court, as Judge Oliver has asked, "is in on it" is a matter for the Court's own knowledge and the Court's own conscience. The admission of out of court statements made by conspirators is governed by E.R. 801(d)(2)(E), around which has developed a considerable body

of case law. The rule governing admission of out-of-court co-conspirator statements balances the protections guaranteed by the Sixth Amendment and accurate fact finding. Contemporary law on this issue is set out in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987.)

Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof. See Fed. Rule Evid. 803(24) (otherwise inadmissible hearsay may be admitted if circumstantial guarantees of trustworthiness demonstrated). Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence. A *per se* rule barring consideration of these hearsay statements during preliminary factfinding is not therefore required. Even if out-of-court declarations by co-conspirators are presumptively unreliable, trial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case. Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case. See, *e.g.*, Fed. Rule Evid. 806 (allowing attack on credibility of out-of-court declarant).

“We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy. Petitioner's case presents a paradigm. The out-of-court statements of Lonardo indicated that Lonardo was involved in a conspiracy with a “friend.” The statements indicated that the friend had agreed with Lonardo to buy a kilogram of cocaine and to distribute it. The statements also revealed that the friend would be at the hotel parking lot, in his car, and would accept the cocaine from Greathouse's car after Greathouse gave Lonardo the keys. Each one of Lonardo's statements may itself be unreliable, but taken as a whole, the entire conversation between Lonardo and Greathouse was corroborated by independent evidence. The friend, who turned out to be petitioner, showed up at the prearranged spot at the prearranged time. He picked up the cocaine, and a significant sum of money was found in his car. On these facts, the trial court concluded, in our view correctly, that the Government had established the existence of a conspiracy and petitioner's participation in it.

“We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. To the extent that *Glasser* meant that courts could not look to the hearsay statements themselves for any purpose, it has clearly been superseded by Rule 104(a). It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. As we have held in other cases concerning

admissibility determinations, “the judge should receive the evidence and give it such weight as his judgment and experience counsel.” *United States v. Matlock*, 415 U.S., at 175, 94 S.Ct., at 995. The courts below properly considered the statements of Lonardo and the subsequent events in finding that the Government had established by a preponderance of the evidence that Lonardo was involved in a conspiracy with petitioner. We have no reason to believe that the District Court's factfinding of this point was clearly erroneous. We hold that Lonardo's out-of-court statements were properly admitted against petitioner.” 483 U.S. 179-183, 107 S.Ct. 2782.

The rule articulated by *Bourjaily, supra*, addresses fully the evidentiary problem presented here: Rudd, like Lonardo, made an out-of-court statement regarding a plan of action. Later events, outlined below, establish a course of conduct consistent with the plans made in Rudd's statement. Simply put, the later events corroborate the Rudd statements. The case cited by the Defendant Administrator in his argument that the Rudd statements are inadmissible hearsay, *United States v. Clark* 18 F.3d 1337 (6<sup>th</sup> Cir., 1994) admitted the statement of the co-conspirator based on a full embrace of the *Bourjaily* analysis, 18 F.3d at 1341-1342, see also *United States v. Scartz* 838 F.2d 876, 879-880 (6<sup>th</sup> Cir., 1988). In *Bourjaily*, *Clark* and *Scartz*, the question was whether the other evidence established the reliability of an out-of-court statement. In *Bourjaily*, *Clark*, and *Scartz*, the other evidence did indeed establish the out-of-court statement's reliability. Plaintiff will undertake here a recapitulation of the other evidence that establishes the reliability of the Rudd statements following this settled rule and its settled application.

The Defendant Administrator has forcefully denounced the email traffic authored by John Rudd, as an out of court statement offered for its truth uncorroborated by other evidence of a conspiracy. The corroboration for the conspiracy itself is replete in the record of *In re Level Propane Gases, Inc.*, Case No. 02-16172, to which the Defendant Administrator has so often already referred. In the Examiner's Report, Dkt. No. 1616, Exhibit Tab 94B, an email from Walter Himmelman to John Rudd, in which he proposes the terms for his compensated return to the scheme, stated: “As you are well aware the main objective of Bill is to “Drive a wedge

between you and the Bank” so he can regain control of the company. I agree this will never happen,” Ex. 1, emphasis supplied. Further corroboration is found in the Verbos-Anter emails, Exhibit 1 to the Plaintiff’s 60(b)(2) Motion of June, 2008, Dkt. No. 3348. In these emails, Verbos, a correspondent in the Rudd email traffic that is the basis for this present Motion, and Anter, conspire to hold back customer payment checks in furtherance of the conspiracy outlined by Rudd in 2000 and 2001, Ex. 2. Further corroboration is found in the Jeff Kessler statement, Exhibit 11 to the September, 2007 Motion to Vacate, Dkt. No. 3140, which discloses that the customer payment checks were indeed held back in furtherance of the conspiracy proposed by Rudd in 2000 and 2001, Ex. 3. Further corroboration is found in the statement of Suzanne Arena, Exhibit 7 in the September 2007 Motion to Vacate, in which the databases are compromised in order to misrepresent the value of the going concern, Ex. 4.

Further corroboration is found by this Court’s Order directing the turnover of the media held by the Plaintiff, now on appeal as *Maloof v. Level Propane Gases, Inc.* Case No. 08-2097 (U.S.D.C., N.D.O.), in which the Court’s states: “The electronic files and records in the possession of Maloof and that are subject the Expedited Discovery Motion were the property of Level Propane as of the commencement of Level Propane’s bankruptcy pursuant to section 541(a) of the United States Bankruptcy Code . . .” Order at page 2, paragraph 2, Dkt. No. 3376. The Court here vouched for the Rudd email traffic, since this email traffic was found and is to be found on the media the Court has found is the property of Level Propane. That forgeries or fabrications would be the property of the Level Propane estate, or relevant to its administration, under Section 541(a) was certainly outside the contemplation of this Order. The Verbos-Anter email exchange corroborating the Rudd statements of 2000 and 2001 the Court itself has ruled is property of the estate. Thus, whatever the Plaintiff’s position on appeal as to whether the media

ought to be turned over, the Plaintiff and the Court must agree that the Verbos-Anter emails are authentic; otherwise the Court could have no reason to order their turn over as estate property. As such, they corroborate the Rudd statements of 2000 and 2001.

All of this foregoing evidence and the rulings of this Court corroborate the existence of a conspiracy, which need be shown only by preponderance of the evidence for purposes of E.R. 801(d)(2)(E), *Bourjaily, supra, Clark, supra, Scartz, supra*. There can be no reasonable doubt that Rudd and Himmelman agreed that Maloof must never regain control of Level Propane. Nor can there be a reasonable doubt that Verbos and Anter agreed to hold back and conceal customer payment checks, nor that these checks were indeed held back. Nor can there be a reasonable doubt that the databases were compromised in furtherance of the conspiracy. All of this is a matter of record in *In Re Level Propane Gases, Inc.*, Case No. 02-16172. All of these matters of record corroborate the existence of the conspiracy described in the Rudd statements of 2000 and 2001.

Turning to the much more difficult issue of whether the Court had a role in the conspiracy, there is likewise competent proof that corroborates the Rudd statements of 2000 and 2001. It is a hoary maxim that a Court speaks through its docket. The Plaintiff respectfully directs the Court's attention to its docket. The Plaintiff stated in his Affidavit of Prejudice, Dkt. Item No. 3298, that the Court was "asking around" in Cuyahoga County Juvenile Court, in Paragraph 4, in relation to the defamatory *Free Times* article. In its Order of May 6, 2008, Dkt. Item No. 3326, the Court denied the Motion to Recuse, permitted the sworn statement of Maloof that he was indeed "asking around" in Juvenile Court regarding Maloof in relation to the *Free Times* article stand unchallenged and uncorrected. Further, the Court is directed to its assurance at page 7, in its Order denying the Motion to Recuse that it would refer the matter to the United

States Attorney in order to determine conclusively that it had no knowledge of the Zagaria prosecutions in the 1980's in which Cindy Doman played a prominent role as Zagaria's "child bride" who guarded the bodies of his 37 murder victims prior to their disposal, and has not returned with any statement for the record regarding that promised referral.

Further, the Court is directed to the fact that it authorized retention of Benesch, Friedlander, Coplan & Aronoff (BFCA)<sup>1</sup> as permanent Debtors' Counsel, Dkt. Item No. 1807, despite the Agreed Conversion Order's explicit condition that they serve only as transitional counsel. The Court is further directed to the fact that the Plaintiff was left off the service list for BFCA's Appointment Order and further directed to the fact that the service list was missing from the Archives Administration records and given to counsel by the Court only after the fact that it was missing was placed on the docket, Dkt. Item No. 3248. The Plaintiff will not be drawn into a knife fight as to whether these matters are dispositive of the Court's attitudes toward the Plaintiff, for all he needs to show for purposes of this present motion is that the Rudd statements of 2000 and 2001 can be corroborated, *Bourjaily v United States, supra*. Whether the Court had a role in any conspiracy is, strangely enough, not at issue, only that the Rudd statements of 2000 and 2001 can be corroborated. Plaintiff submits that the Court's own conduct, through its docket, may fairly be read to corroborate the reliability of the Rudd statements of 2000 and 2001, in that the orders of this Court have made it plain that the Plaintiff has, in this Court, has had "at no time . . . even a glimmer of hope of winning or the ability to receive any money from a settlement or victory," Motion Exhibit 2, attachment to October 13, 2000 Rudd email, paragraph 8. As outrageous as the Rudd statements of 2000 and 2001 seem, his statements have proven prescient.

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1. Judge Aldrich described BFCA as "officers of the Court representing the Bank Group" in her Opinion in *Maloof v. Level Propane Gases, Inc.* Case No. 07-0153 (U.S.D.C., N.D.O.), Dkt. Item 20 at 5.

Based on the foregoing, the Rudd statements, although outrageous on their face, must be considered in the context of the cumulative evidence in this matter, for as the court in *Bourjaily*, *supra*, said: “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it,” 483 U.S. at 179, 107 S.Ct. at 2782. Contrary to the assertions of the Defendant Administrator’s counsel, Plaintiff has not presented this material to the Court “recklessly,” but with a full appreciation of its gravity and drawing only the most conservative conclusions from it. The statute, 28 U.S.C. §455, and the evidence rule, E.R. 801(d)(2)(E) call upon the Court to now draw upon its resolve to face the harsh facts that this evidence presents, and if it determines in its sound discretion that it will not recuse itself, then to take such firm action to root out the corruption that has made so bold and so far successful steps to seize control of not only Level Propane but this court.

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**AN INDEPENDENT INVESTIGATION AS TO THE GENUINENESS AND AUTHORSHIP OF THE EMAIL TRAFFIC OF RUDD IS WARRANTED.**

The Plaintiff is likewise interested in the authorship of the Rudd statements. All of his investigations to date support their authorship by John Rudd. Plaintiff specifically represents that a full forensic examination of the media on which these statements were found is being conducted as this Memorandum is written. Plaintiff anticipates that this examination will be completed by July 15, 2009, at which point forensic copies of the media upon which the Rudd statements were found will be available. Plaintiff notes that a forensic copy of the media will be made available to the Public Integrity Section of the Department of Justice, which has already been advised of these circumstances, see Ex. 5, attached. Whatever issues the Defendant Administrator may raise as to the text of the statements, Plaintiff maintains that the physical

evidence as well as the corroborative evidence already here cited will authenticate the Rudd statements.

### **CONCLUSION**

The Plaintiff has presented this material to the Court and thereby has commended it to the Court's sound discretion. He has presented the material, stating only that Rudd has claimed the Court as a participant in his conspiracy. Whether the Court participated in Rudd's conspiracy is a matter for others to decide, certainly not the Plaintiff. Plaintiff only poses the question whether under the circumstances a reasonable person could regard the Court as impartial under 28 U.S.C. §455. Plaintiff urges the Court to take its wisest course, but only the Court can speak for itself.

Respectfully Submitted,

/s/ David C. Eisler

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### **SERVICE**

The foregoing has been filed electronically this 23<sup>rd</sup> day of June, 2009. It has been electronically served on all parties to this action whose counsel have entered a notice of appearance herein. It is available to all other parties who access the Court website.

/s/David C. Eisler

David C. Eisler, Counsel for the Plaintiff