UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:15-bk-04241-FMD
Chapter 7

Benjamin H. Yormak,

Debtor.
_____/

ORDER DENYING CREDITOR STEVEN R. YORMAK'S MOTION FOR RECUSAL OR DISQUALIFICATION OF PRESIDING JUDGE CARYL E. DELANO

Creditor Steven R. Yormak ("Creditor") moves to disqualify the undersigned judge from presiding in this Chapter 7 case (Doc. No. 467) (the "Recusal Motion"). Creditor alleges that the Court has actual and perceived pervasive bias against him and that the Court has deprived him of his procedural due process rights under the Fifth and Fourteenth Amendments. Creditor also requests that another judge be assigned to hear the Recusal Motion.

After careful consideration of the Recusal Motion and the record, the Court concludes, first, that there is no requirement that a different judge rule on the Recusal Motion, and second that there is no valid basis for the Court's recusal. Therefore, the Court will deny the Recusal Motion.

A. STANDARD FOR RECUSAL

Federal Rule of Bankruptcy Procedure 5004 provides that bankruptcy judges are governed by 28 U.S.C. § 455. Under § 455(a), a federal judge must disqualify himself if his "impartiality might reasonably be questioned."[1]

The objective standard of Section 455(a) requires the court to consider "whether a disinterested observer, fully informed of the facts underlying the grounds on which recusal [is] sought, would entertain a significant doubt about the judge's impartiality."[2] "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion."[3] This is because a judge's adverse ruling or delay in ruling on pending matters generally does not "constitute the sort of 'pervasive bias' that necessitates recusal."[4] Judicial rulings instead are proper grounds for appeal.[5]

Section 455(b) also mandates disqualification where a judge "has a personal bias or prejudice concerning a party."[6] The judge's bias or prejudice must be personal and extrajudicial.[7] In other words, the bias or prejudice must stem from something other than what the judge learned by participating in the case.[8] Thus, opinions formed by a judge based on events occurring during a pending proceeding do not constitute a bias mandating recusal unless the opinions "display a deep-seated favoritism or antagonism that would make fair judgment impossible."[9]

As the court stated in *Busse v. Lee County, Florida*, "a judge contemplating recusal should not ask whether he or she believes he or she is capable of impartially presiding over the case but whether 'impartiality might reasonably be questioned,'" and "a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require."[10]

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[1] 28 U.S.C. § 455(a).

[2] *Liebman v. Deutsche Bank Nat'l Trust Co.*, 462 F. App'x 876, 879 (11th Cir. 2012).

[3] *Liteky v. United States*, 510 U.S. 540, 555 (1994).

[4] *Loranger v. Stierheim*, 10 F.3d 776, 780-781 (11th Cir. 1994).

[5] *Liteky*, 510 U.S. at 555.

[6] *Curves, LLC v. Spalding Cty., Ga.*, 685 F.3d 1284, 1288 (11th Cir. 2012) (quoting *United States v. Amedeo*, 487 F.3d 823, 828 (11th Cir. 2007)).

[7] *Liebman*, 462 F. App'x at 879 (citing *Amedeo*, 487 F.3d at 828).

[8] *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990).

[9] *Liteky*, 510 U.S. at 555.

[10] 2010 WL 427418 (M.D. Fla. February 1, 2010) (internal citations omitted).

B. BACKGROUND

Creditor is an attorney licensed to practice law in Canada and the State of Massachusetts, but not in the State of Florida. Creditor contends that he provided consulting services to his son, Debtor Benjamin Yormak ("Debtor"), a Florida attorney, and to Debtor's law firm pursuant to certain written and oral consulting agreements (the "Consulting Agreements").[11] Debtor's law practice includes the representation of clients in whistleblower and Qui Tam actions.

The following is a listing of the cases, motions, and rulings that are most relevant to the Recusal Motion. Descriptive headings are included as guideposts and not as a limitation on the events described under the heading.

Prepetition Litigation Between the Parties

For years, Creditor and Debtor have been embroiled in litigation relating to Debtor's alleged breaches of the Consulting Agreements. In December 2013, Creditor sued Debtor in state court; the action was removed to the United States District Court for the Middle District of Florida, Fort Myers Division (the "District Court Litigation").[12]

In the District Court Litigation, Debtor moved to dismiss Creditor's breach of contract claims because, Debtor alleged, the Consulting Agreements were disguised agreements to share attorney's fees with a non-Florida attorney in violation of the ethical rules governing the Florida Bar.[13] The District Court denied the motion to dismiss, finding that:

> As an initial matter, "Florida courts have held that it is error to use an ethical rule as a basis to invalidate or render void a provision in a private contract between two parties." Moreover, in order to reach [Debtor's] desired conclusion, the Court would have to reject the Amended Complaint's allegation that the contracts are valid consulting agreements in favor of [Debtor's] proffered interpretation that they are actually proscribed fee-sharing agreements. This is not permissible in the context of a motion to dismiss.[14]

In addition to the District Court Litigation, in 2013, Debtor, Creditor, and Creditor's wife (who is not Debtor's mother) were involved in state court litigation relating to their ownership of a condominium (the "Condominium Litigation").[15] Debtor and Creditor entered into a settlement agreement resolving the issues in the Condominium Litigation. The settlement agreement included a release (the "Condominium Release").

Debtor's Chapter 13 Bankruptcy Case, Creditor's Proof of Claim, and Debtor's Turnover Motion

On April 24, 2015, Debtor filed this bankruptcy case, originally filed under Chapter 13.[16] The filing of the bankruptcy case operated as a stay of the District Court Litigation.[17] This Court's case docket reflects over 470 entries. Over the past four years, the Court has conducted 23

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[11] Proof of Claim No. 4-2.

[12] *Steven Yormak v. Benjamin H. Yormak and Yormak Employment & Disability Law, etc.*, Case No. 2:14-cv-33-JES-CM, United States District Court for the Middle District of Florida.

[13] District Court Case No. 2:14-cv-33-JES-CM, Doc. No. 16.

[14] District Court Case No. 2:14-cv-33-JES-CM, Doc. No. 24, p. 5-6 (citations omitted).

[15] *Steven. R. Yormak and Agata Yormak v. Benjamin H. Yormak*, Case No. 13-CA-83, in the Circuit Court for the Twentieth Judicial District, in and for Lee County, Florida.

[16] Doc. No. 1. Debtors with regular income are eligible to file under Chapter 13 of the Bankruptcy Code and to propose a plan to repay creditors. Generally, the court confirms the debtor's plan if the plan provides for the payment of debtor's disposable income into the plan and if the distributions to creditors are at least what they would be in a Chapter 7 liquidation case. See 11 U.S.C. §§ 109, 1322, and 1325.

[17] 11 U.S.C. § 362(a).

hearings. Creditor attended eight of the court hearings by telephone.[18]

Creditor timely filed a proof of claim in the bankruptcy case in the amount of $724,275.00 (the "Proof of Claim").[19] Thereafter, Creditor amended the Proof of Claim to total $1,095,275.00.[20] On September 17, 2015, Debtor filed an objection to the Proof of Claim ("Debtor's Objection to Claim").[21] Debtor's substantive objections were first, that the claim is unenforceable because it asserts a request to split legal fees with a non-Florida lawyer; and second, that the Condominium Release constituted a release of all of Creditor's claims against Debtor.

Debtor also filed a motion for turnover ("Debtor's Turnover Motion") seeking the turnover of funds held by another law firm, Duane Morris, LLP. Debtor claimed these funds were due him as his share of attorney's fees in a Qui Tam action.[22] Debtor represented that Debtor and Creditor had made competing demands upon Duane Morris, LLP, for the release of the funds.

On September 29, 2015, attorney Michael Dal Lago filed a notice of appearance on Creditor's behalf.[23] Mr. Dal Lago filed a response to Debtor's Turnover Motion, contending that the funds due to Debtor were property of Debtor's bankruptcy estate.[24] The Court granted Debtor's Turnover Motion and directed that the funds, represented to be in excess of $500,000.00, be held in Mr. Dal Lago's trust account pending further order of Court.[25]

[18] Telephonic appearances at hearings are allowed in the Court's discretion as set forth on the Court's Telephonic Appearance Policy, http://www.flmb.uscourts.gov/courtroom_services/.
[19] Claim No. 4-1.
[20] Claim No. 4-2.
[21] Doc. No. 36.
[22] Doc. No. 35.
[23] Doc. No. 53.
[24] Doc. No. 57.
[25] Doc. No. 74.

Creditor's First Motion for Summary Judgment and Debtor's Cross-Motion for Summary Judgment

In November 2015, Creditor filed a motion for summary judgment on Debtor's Objection to Claim on the grounds that the District Court had already ruled on the ethical fee-splitting issue and that the Condominium Release did not include of release of the claims asserted in the Proof of Claim ("Creditor's First Motion for Summary Judgment").[26] Debtor filed a cross-motion for summary judgment ("Debtor's Cross-Motion for Summary Judgment") that raised a new issue: that Creditor's claim was an unlawful attempt to recover monies derived from Creditor's unauthorized practice of law (the "UPL Issue").[27]

The Court conducted hearings on Creditor's First Motion for Summary Judgment and Debtor's Cross-Motion for Summary Judgment in January and March 2016. On April 22, 2016, the Court entered its ruling (the "Summary Judgment Order").[28] The Summary Judgment Order granted Creditor's First Motion for Summary Judgment and overruled Debtor's Objection to Claim. However, the Court deemed Debtor's Objection to Claim to be amended to include an objection to claim based on the UPL Issue. Because the Court found issues of fact on the UPL Issue, the Court denied Debtor's Cross-Motion for Summary Judgment.

Debtor's Motion for Leave to File an Amendment to the Objection to Claim and Creditor's Second Motion for Summary Judgment

In May 2016, Debtor filed a motion for leave to file an amendment to Debtor's Objection to Claim; Debtor sought to state additional objections to the Proof of Claim.[29] This motion was set for hearing on May 26, 2016.[30] Prior to the May hearing, Creditor, still represented by Mr. Dal Lago, filed a motion for summary judgment

[26] Doc. No. 70.
[27] Doc. No. 77.
[28] Doc. No. 88.
[29] Doc. No. 90.
[30] Doc. No. 92.

on the UPL Issue ("Creditor's Second Motion for Summary Judgment").[31] Creditor argued first, that Debtor had waived the UPL Issue by not raising it in the District Court Litigation; and second, that the Consulting Agreements did not provide for the unlicensed practice of law. Creditor also filed an objection to Debtor's motion for leave to file an amendment to Debtor's Objection to Claim.[32]

At the May 26, 2016 hearing, the Court denied Debtor's motion for leave to file an amendment to Debtor's Objection to Claim.[33] The Court also set a briefing schedule and a hearing on Creditor's Second Motion for Summary Judgment.[34]

The Conversion of Debtor's Chapter 13 Case to a Chapter 7, the Bad Faith Motion, and the Trustee's Motion for Turnover

The Court scheduled a hearing on Creditor's Second Motion for Summary Judgment for August 26, 2016. Prior to the hearing, Debtor filed a notice of voluntary conversion of the case from Chapter 13 to Chapter 7.[35] Creditor objected to the case being converted to a Chapter 7.[36] The Court set a hearing on Debtor's request for conversion and Creditor's objection to the request for August 26, 2016.[37]

At the August 26, 2016 hearing, the Court ordered the case converted to a Chapter 7 case; the Court then continued the hearing on Creditor's Second Motion for Summary Judgment, to be reset once a Chapter 7 trustee was appointed.[38] Robert Tardif, Jr., was appointed as Chapter 7 trustee (the "Trustee").[39] Thereafter, the hearing on Creditor's Second Motion for Summary Judgment was scheduled for December 15, 2016.[40]

Meanwhile, in October 2016, the Trustee filed a motion asking the Court to determine that Debtor's conversion of the case from a Chapter 13 to a Chapter 7 was in bad faith such that, under 11 U.S.C. § 348(f)(2), property of the bankruptcy estate in the converted case would consist of property of the estate as of the date of conversion, rather than as of the date of filing of the original bankruptcy petition (the "Bad Faith Motion").[41] Creditor filed a joinder to the Bad Faith Motion.[42] In addition, the Trustee filed a motion for turnover relating to the $500,000.00 held in Mr. Dal Lago's trust account (the "Trustee's Motion for Turnover").[43] The Court scheduled this motion for hearing on December 15, 2016.[44]

The Bankruptcy Court's Ruling on Creditor's Second Motion for Summary Judgment and the Withdrawal of Creditor's Counsel

At the December 15, 2016 hearing, the Court denied Creditor's Second Motion for Summary Judgment. The Court ruled that Debtor had not waived the UPL Issue by failing to raise it in the District Court Litigation and that factual issues regarding whether the Consulting Agreements called for the unlicensed practice of law precluded summary judgment.[45] The Court then set Debtor's Objection to Claim and the Bad Faith Motion for trial for two days in April 2017.[46] At this point, the UPL Issue was the sole issue remaining for trial. The Court also deferred ruling on the Trustee's Motion for Turnover, pending the April trial.[47]

On December 27, 2016, Mr. Dal Lago filed an emergency motion for leave to withdraw as

[31] Doc. No. 94.
[32] Doc. No. 97.
[33] Transcript, Doc. No. 102; Doc. No. 101.
[34] Doc. No. 100.
[35] Doc. No. 121.
[36] Doc. No. 124, supplemented by Doc. No. 131. Chapter 7 cases are liquidation cases in which a court-appointed trustee marshals the debtor's assets, liquidates them, and distributes payment to creditors in the order of priority established under the Bankruptcy Code.
[37] Doc. No. 127.
[38] Doc. Nos. 136 and 138.
[39] Doc. No. 142.
[40] Doc. No. 154.
[41] Doc. No. 153.
[42] Doc. No. 163.
[43] Doc. No. 167; Doc. No. 169 (Amended Motion); Doc. No. 170 (Corrective Motion).
[44] Doc. No. 174.
[45] Doc. No. 213.
[46] Doc. Nos. 184, 192, and 226.
[47] Doc. No. 190.

Creditor's counsel,[48] which was granted by the Court.[49] Creditor then commenced representing himself *pro se*. Shortly thereafter, Creditor filed a motion seeking authority to participate in the Court's electronic filing system, CM/ECF.[50] Debtor objected to this request on the ground that a similar request had been denied by the District Court in the District Court Litigation.[51] The Court considered Creditor's request to be a motion to appear *pro hac vice* and granted the motion, thus allowing Creditor CM/ECF filing privileges. The Court also dispensed with the need for local counsel and waived the filing fee.[52]

Creditor's First Appeal

On January 31, 2017, Creditor timely filed a notice of appeal from the Court's order denying Creditor's Second Motion for Summary Judgment together with a motion for leave to appeal ("Creditor's First Appeal").[53] Among other things, Creditor contended that the Court erred when it found that Debtor had not waived the UPL Issue by failing to raise it in the District Court Litigation.[54]

While Creditor's First Appeal was pending, the Court was divested of jurisdiction over the UPL Issue,[55] at that time the only issue remaining on Debtor's Objection to Claim. Therefore, the Court cancelled the April 2017 trial dates and stayed discovery pending the outcome on appeal.[56]

On June 19, 2017, the District Court denied Creditor's motion for leave to appeal.[57] In ruling on Creditor's waiver argument, the District Court stated:

> At the district court level, a failure to plead an affirmative defense generally results in a waiver of that defense. But that same standard does not apply in contested bankruptcy matters.
>
> After bankruptcy proceedings are initiated, a creditor may file a claim against assets held by a debtor. The claim is then deemed allowed, "unless a party in interest . . . objects." A debtor may specifically object to a claim by showing it "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured."
>
> Notably, while the Bankruptcy Rules provide the procedure for a debtor to file an objection to a claim, neither the Bankruptcy Code nor the Bankruptcy Rules provide a calendar-based cutoff point for filing such an objection.[58]

On July 18, 2017, Creditor filed a notice of appeal of the District Court's ruling to the Eleventh Circuit Court of Appeals[59] and an emergency motion to stay all bankruptcy proceedings pending that appeal.[60] On July 20, 2017, the District Court denied the motion to stay.[61]

On September 13, 2017, the Eleventh Circuit dismissed the appeal for lack of jurisdiction.[62] Creditor then filed a motion for reconsideration of the Eleventh Circuit's dismissal order,[63] which

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[48] Doc. No. 188.
[49] Doc. No. 214.
[50] Doc. No. 232.
[51] Doc. No. 256.
[52] Doc. No. 279.
[53] Doc. Nos. 221 and 222.
[54] Doc. No. 222, p. 7.
[55] *In re Roberts*, 291 F. App'x 296, 298 (11th Cir. 2008) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982)).
[56] Doc. No. 278.
[57] District Court Case No. 2:17-cv-73-SPC, Doc. No. 29.
[58] District Court Case No. 2:17-cv-73-SPC, Doc. No. 29, pp. 8-9 (citations omitted).
[59] District Court Case No. 2:17-cv-73-SPC, Doc. No. 30.
[60] District Court Case No. 2:17-cv-73-SPC, Doc. No. 31.
[61] District Court Case No. 2:17-cv-73-SPC, Doc. No. 33.
[62] District Court Case No. 2:17-cv-73-SPC, Doc. No. 34.
[63] Eleventh Circuit Court of Appeals Case No. 17-13239.

was denied by the Eleventh Circuit on October 24, 2017.[64]

Creditor's Motion for More Definite Statement, Debtor's Amended Objection to Claim, and Debtor's Motion for Leave to Amend

On February 28, 2017, notwithstanding the fact that Creditor's First Appeal was then pending in the District Court, Creditor filed a motion to strike Debtor's Objection to Claim or for more definite statement ("Creditor's Motion for More Definite Statement").[65] Debtor filed written responses[66] and unilaterally filed an amended objection and more definite statement (the "Amended Objection to Claim").[67] Creditor filed a motion to strike Debtor's Amended Objection to Claim.[68]

At a hearing on October 18, 2017, the Court struck Debtor's Amended Objection to Claim, as it was filed without permission from the Court. And, in light of Creditor's then pending motion for reconsideration in the Eleventh Circuit, the Court deferred ruling on Creditor's Motion for More Definite Statement. The Court stated:

> To summarize, if the Eleventh Circuit grants the pending motion for rehearing, the UPL issue is likely moot. If the motion for rehearing is denied, I will enter an order granting [Creditor's] motion for more definite statement and permit the Debtor to file an amended objection on the UPL issue only.
>
> If Debtor wishes to raise further objections, he may file a motion for leave to do so.[69]

Shortly after the Court announced this ruling, on October 24, 2017, the Eleventh Circuit denied Creditor's motion for reconsideration of the dismissal of his appeal, thus terminating Creditor's First Appeal.[70]

This Court's Ruling on Debtor's Motion to Amend Objection and Creditor's Second Appeal

On December 5, 2017—with Creditor's First Appeal having been concluded—Debtor filed his *Motion for Leave to Amend Debtor's Objection to Claim No. 4-1 Filed by Steven R. Yormak* ("Debtor's Motion for Leave to Amend").[71] On January 17, 2018, Creditor filed a motion to strike Debtor's proposed amended objection regarding the UPL Issue ("Creditor's Motion to Strike").[72]

Creditor's primary contention, a position he has maintained since Debtor first raised the UPL Issue,[73] is that the Florida Supreme Court has exclusive jurisdiction to determine whether an activity constitutes the unlicensed practice of law.[74]

At a hearing on April 4, 2018, the Court orally announced its ruling granting Debtor's Motion for Leave to Amend and denying Creditor's Motion to Strike.[75] The Court stated:

> Under Federal Rule of Civil Procedure 15, incorporated by Federal Rule of Bankruptcy Procedure 7015, a liberal standard is applied to motions for leave to amend, and leave to amend should be freely given, for justice so requires. That's *Senger Brothers Nursery, Inc. v. E.I. Dupont De Nemours & Co.*, 184 FRD 674, a decision from the Middle District of Florida, 1999.
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> The decision whether to grant leave to amend a complaint is within the sole discretion of the trial court. That's *Laurie v. Alabama Court of Criminal Appeals*,

[64] Eleventh Circuit Court of Appeals Case No. 17-13239.
[65] Doc. No. 270.
[66] Doc. Nos. 307, 308, and 325.
[67] Doc. No. 326.
[68] Doc. No. 327.
[69] Transcript, Doc. No. 354, p. 10, ll. 5-12.
[70] Eleventh Circuit Court of Appeals Case No. 17-13239.
[71] Doc. No. 361.
[72] Doc. No. 387.
[73] Doc. Nos. 231, 347, and 362.
[74] Doc. No. 387, pp. 32-42.
[75] Transcript, Doc. No. 400.

> 256 F.3d 1266, an Eleventh Circuit decision from 2001.
>
> Because discovery is ongoing in this case and a trial date has yet to be set, I will grant the motion for leave to amend.[76]

The Court also set a schedule for Debtor to file a second amended objection to claim and for Creditor to file a response, with a status conference to be held on May 23, 2018. The Court's written order was entered on April 19, 2018, (the "April 19, 2018 Order").[77]

On May 1, 2018, Creditor filed an appeal and motion for leave to appeal to the District Court from the April 19, 2018 Order ("Creditor's Second Appeal").[78] In his motion for leave to appeal, Creditor argued, as he did before this Court, that this Court is without jurisdiction because the Florida Supreme Court has exclusive jurisdiction over the practice of law.[79]

On June 6, 2018, the District Court entered its order denying Creditor's Motion for Leave to Appeal.[80] In its order, the District Court stated:

> The decision of the Bankruptcy Court is in line with current case law and does not involve a matter of public importance. Further, the order did not involve a question of law where there is a split of authority because there are no conflicting decisions or case law to the contrary.[81]

Creditor then appealed the District Court's ruling to the Eleventh Circuit Court of Appeals[82] with a request that the District Court certify to the Court of Appeals the issue that there is no controlling law regarding whether the Florida Supreme Court has exclusive jurisdiction over the UPL Issue, including invoking UPL as a defense or objection.[83] On July 11, 2018, the District Court denied Creditors' request for certification.[84] One month later, the Eleventh Circuit, on its own motion, dismissed Creditor's Second Appeal for lack of jurisdiction.[85] On August 31, 2018, Creditor filed a motion for reconsideration of the Eleventh Circuit's dismissal order.[86]

Creditor's Motion to Withdraw the Reference

On May 22, 2018, Creditor filed a motion for withdrawal of the reference.[87] On July 25, 2018, the District Court denied Creditor's motion, stating:

> [T]he Court finds that [Creditor] has failed to show cause why withdrawal at the pleading stage is an effective way of expediting the bankruptcy process. The pleadings were recently amended, amended objections were filed, discovery is ongoing, and [Creditor] is not the only creditor just the majority creditor. Further, [Creditor] is simply trying another avenue to achieve a ruling on the same unlicensed practice of law issue raised by interlocutory appeals. Withdrawing a discrete issue in no way advances uniformity in bankruptcy administration, nor does it facilitate the bankruptcy process. There is no adversary proceeding at issue being withdrawn. [Creditor] is seeking to withdraw the administration of the bankruptcy case itself but only as to his claim. Because this is not an efficient use of judicial resources, and would cause further delays, the motion will be denied. If [Creditor] is indeed entitled to a jury, and the case reaches a trial ready stage where a jury is to be selected, the Court

[76] Transcript, Doc. No. 400, p. 5, l. 24 – p. 6, l. 12.
[77] Doc. No. 398.
[78] Doc. Nos. 404 and 405.
[79] Doc. No. 405, p. 1.
[80] Doc. No. 443.
[81] Doc. No. 443, pp. 8-9.
[82] District Court Case No. 2:18-cv-309-JES, Doc. No. 16.
[83] District Court Case No. 2:18-cv-309-JES, Doc. No. 19.
[84] District Court Case No. 2-18-cv-309-JES, Doc. No. 20.
[85] Eleventh Circuit Court of Appeals Case No. 18-12623; Doc. No. 478.
[86] Eleventh Circuit Court of Appeals Case No. 18-12623.
[87] Doc. No. 420.

would consider a motion to withdraw the reference at that stage but no sooner.[88]

Discovery Issues:
The "Attorney Eyes Only Order" and
Creditor's Motion to Compel

For nearly two years, discovery issues have been pending before the Court.

At a November 10, 2016 hearing, during a discussion of a trial date for the Bad Faith Motion and the Trustee's contemplated discovery requests, Debtor's counsel raised concerns about the confidentiality of the documents that Debtor was to produce to the Trustee because of issues with the Justice Department and Debtor's possible need to file a motion for a protective order.[89] The Court understood Debtor's counsel to be referring to the fact that the documents that the Trustee sought to be produced related to Debtor's representation of plaintiffs in pending Qui Tam cases. These documents were potentially relevant to both the "property of the estate" issue presented by the Bad Faith Motion and to the liquidation of the amount due to Creditor on the Proof of Claim.

At the November 10, 2016 hearing, Creditor was still represented by Mr. Dal Lago. Mr. Dal Lago asked to participate in the discovery process and the Court directed the documents be produced for "attorneys' eyes only."[90] Mr. Dal Lago requested that he be permitted to share documents with Creditor; the Court deferred that issue until the continued hearing on December 15, 2016.[91]

On December 8, 2016, this Court entered an order resetting the hearing on the Bad Faith Motion.[92] This order included the following provision, commonly referred to by the parties as the "Attorney Eyes Only Order" or the "AEO Order":

> [U]nless and until the Court enters an order otherwise, any and all information and/or documentation that is produced by the Debtor regarding the identification of his clients and claim/case information that would not be otherwise publicly available shall be kept confidential and, at this time, shall not be disclosed to any individual or entity except the Trustee and attorneys of record for the Debtor and Steven Yormak.[93]

On February 2, 2017, Creditor, now representing himself *pro se*, filed a motion to rescind the AEO Order.[94] The Court's consideration of this motion was delayed while Creditor's First Appeal was pending. On November 7, 2017, after resolution of Creditor's First Appeal, Creditor raised the AEO Order issue again by filing a second motion to rescind the AEO Order ("Creditor's Motion to Rescind AEO Order").[95]

On November 14, 2017, the Court conducted a hearing on Creditor's Motion to Rescind AEO Order, and subsequently entered its *Order on Motion to Rescind Sua Sponte Order for Attorney Eyes Only*.[96] That order continued the hearing to January 31, 2018, and instructed Creditor, if he wished to pursue the issues in Creditor's Motion to Rescind AEO Order, to file a separate motion to compel with sufficient supporting documentation.

On December 6, 2017, as anticipated by the Court in its *Order on Motion to Rescind Sua Sponte Order for Attorney Eyes Only*, Creditor filed his *Motion to Compel Debtor Discovery* ("Creditor's Motion to Compel").[97] At the January 31, 2018 hearing on Creditor's Motion to Compel, Creditor made the following representation to the Court regarding his desire to conduct discovery on the UPL Issue:

> I'm not going to contact [Debtor's] clients. There's nothing in it for me at the

[88] District Court Case No. 2:18-cv-508-JES, Doc. No. 7, pp. 3-4 (citations omitted).
[89] Transcript, Doc. No. 186, p. 6, ll. 2-21.
[90] Transcript, Doc. No. 186, p. 16, ll. 15-25.
[91] Transcript, Doc. No. 186, p. 17, ll. 17-24.
[92] *Order Resetting Preliminary Hearing on Trustee's Motion to Determine that Property Received Post-Petition Is Property of the Bankruptcy Estate*, Doc. No. 180. The order was prepared by the Trustee.
[93] Doc. No. 180, p. 2.
[94] Doc. No. 231.
[95] Doc. No. 347.
[96] Doc. No. 368.
[97] Doc. No. 363.

> moment, and I will notify the Court by formal motion, I guess, if I really feel I need to at some point.[98]

At the conclusion of the hearing Court summarized its ruling:

> All right. So Mr. Yormak [Creditor], you can give me an order that grants your motion to rescind any Attorney's Eyes Only rulings, defers consideration of the motion to compel, [and] requires no discovery responses or production of documents pending further order of the Court.[99]

Thereafter, the Court entered an order that rescinded the AEO Order and stayed discovery pending the Court's ruling on Debtor's Motion for Leave to Amend the Objection to Claim (the "AEO Rescission Order").[100]

At the conclusion of the April 4, 2018 hearing, after the Court had granted Debtor's Motion for Leave to Amend the Objection to Claim, Creditor brought up his earlier representation that he would not contact Debtor's clients. Creditor stated:

> [P]reviously, at our January 31st, 2018 attendance, I undertook to not contact the Debtor clients. At this point, I want to withdraw that undertaking and offer to you, if you would make a ruling, if you want to make a ruling, I don't want to be held to my own undertaking.
>
> So I'm officially withdrawing that undertaking not to contact the Debtor's former clients and clients.[101]

The Court and Creditor then engaged in the following colloquy:

> THE COURT: It seems to me that it's appropriate to open discovery to the extent it hasn't been opened already. And it seems to me that before you just start contacting clients, Mr. Yormak, you probably want to ascertain what clients, the identity of the clients that the Debtor, Benjamin Yormak, would identify as being witnesses or having information regarding his allegations of the unauthorized practice of law, but . . .
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> [CREDITOR]: Well, Your Honor, as far as I'm concerned 400 of the clients are potential witnesses. And I don't want in any way to . . . .[102]

The Court, in order to preserve the status quo, and to give Debtor's counsel an opportunity to react if Creditor commenced contacting Debtor's clients, then ordered Creditor not to contact clients The Court stated:

> And I'm not saying I'm going to forever prohibit you from contacting clients, I'm not saying that at all. But I think that [Debtor's counsel] deserves some time to respond to that without your calling 100 people tomorrow, okay?[103]

Less than a month later, in May 2018, Creditor filed the Second Appeal, appealing from the Court's order granting Debtor's Motion for Leave to Amend.[104] Discovery has again been stayed, pending the outcome of Creditor's Second Appeal.[105]

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[98] Transcript, Doc. No. 390, p. 94, ll. 16-19.

[99] Transcript, Doc. No. 390, p. 106, ll. 20-24.

[100] Doc. No. 475. On February 7, 2018, Creditor submitted a proposed order from the January 31, 2018 hearing, to which Debtor's counsel objected. On May 23, 2018, an agreed form of order was submitted to the Court. However, because the proposed order did not contain any background or context, the order was incomprehensible, even to this Court. Thereafter, when it came to the Court's attention that no order had been entered, the Court drafted its own order. The order was entered on August 2, 2018.

[101] Transcript, Doc. No. 400, p. 21, ll. 7-13.

[102] Transcript, Doc. No. 400, p. 22, ll. 12-23.

[103] Transcript, Doc. No. 400, p. 24, l1. 9-13.

[104] Doc. Nos. 404 and 405.

[105] As noted above, the Eleventh Circuit dismissed Creditor's Second Appeal by order entered August 14,

Creditor's Recusal Motion

On July 24, 2018, Creditor filed his Recusal Motion.[106] In light of the Recusal Motion, the Court continued all matters that were then set for hearing on July 30, 2018, to August 22, 2018,[107] including the hearing on Creditor's Renewed Motion for Summary Judgment.[108] Thereafter, Debtor's counsel and Creditor jointly requested that the Court accommodate their travel schedules, and the matters set for hearing on August 22, 2018 were continued to September 17, 2018.[109]

C. ANALYSIS

1. This Court is the Appropriate Court to Rule on the Recusal Motion.

As a threshold matter, 28 U.S.C. § 455 does not provide for the referral of the question of recusal to another judge; courts hold that a challenged judge may either opt to refer the matter to another judge for decision or rule on it himself.[110] A judge has a duty to recuse himself or herself if the judge sitting on a case is aware of grounds for recusal under § 455.[111] As this Court is bound to recuse if there are grounds and there is no requirement mandating that another judge hear a motion to recuse, the Court will consider the Recusal Motion itself.

2. Grounds for the Recusal Motion

In the Recusal Motion, Creditor cites to examples of this Court's alleged bias against him. The examples are summarized as follows: the Court's entry of the AEO Order; the Court's barring Creditor from contacting witnesses and denial of discovery requests; the Court's permitting Debtor to supplement Debtor's Objection to Claim; the Court's allegedly becoming an advocate for Debtor; and finally, the Court's denial of Creditor's constitutional due process rights under the Fifth and Fourteenth Amendments.[112]

The Court will address each of Creditor's contentions in turn.

(a) The Court's Entry of the AEO Order

The AEO Order related to discovery requests in connection with the Trustee's Bad Faith Motion. If the Court were to find that Debtor converted his case from a Chapter 13 case to a Chapter 7 case in bad faith, property of Debtor's bankruptcy estate would include property as of the date of the conversion.[113] For that reason, the Trustee wanted discovery regarding Debtor's clients and contingency fees that arose between the date of the bankruptcy case's filing and the date of conversion from a Chapter 13 to a Chapter 7. The requested discovery may also relevant to Debtor's Objection to Claim, because the Proof of Claim asserts claims arising from Debtor's representation of clients.

While Creditor contends that the AEO Order was entered by the Court "*sua sponte*," this is not so. When Creditor's then attorney, Mr. Dal Lago, stated that his client would like to join in the Trustee's discovery requests,[114] Debtor's counsel raised the need to maintain the confidentiality of Debtor's clients and ongoing litigation involving

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2018, but on August 31, 2018, Creditor filed a motion for reconsideration of that ruling.

[106] Doc. No. 467.

[107] Doc. No. 470.

[108] Doc. No. 428. Other matters being continued include a status conference on Debtor's Second Amended Objection to Claim (Doc. No. 397); Debtor's Renewed Motion to Strike Creditor's Response to Debtor's Second Amended Objection to Claim (Doc. No. 459); Creditor's Motion to Compel Discovery (Doc. No. 363); Debtor's Amended Motion for Partial Summary Judgment (Doc. No. 418); Creditor's Motion for Reconsideration of Order Denying Creditor a Jury Trial (Doc. No. 429); Creditor's Amended Motion to Vacate Conversion Order from Chapter 13 to Chapter 7 (Doc. No. 439); and, Debtor's Motion to Strike Creditor's Defenses and Affirmative Defenses (Doc. No. 446).

[109] Doc. No. 473.

[110] *United States v. Craig*, 853 F. Supp. 1413, 1415 (S.D. Fla. 1994).

[111] *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980).

[112] Doc. No. 467, p. 1-3.

[113] 11 U.S.C. § § 348(f)(2).

[114] Transcript, Doc. No. 186, p. 16, ll. 15-17.

the Department of Justice.[115] Because Creditor was represented by counsel as at the time of the AEO Order, Creditor was not prejudiced by the Court limiting discovery from Debtor to "attorney's eyes only."

Creditor has raised complaints about the AEO Order on several occasions.[116] But during much of the time that issues regarding the AEO Order have been pending, discovery issues have been deferred—including during the nearly nine-month period that Creditor's First Appeal was pending and, now, the more than four months that Creditor's Second Appeal has been pending. In any event, at a hearing conducted in January 2018, the Court announced its ruling vacating the AEO Order and has since entered an order to that effect.[117]

The Court finds that a disinterested observer, fully informed of the facts underlying the entry of the AEO Order, would not entertain a significant doubt about this Court's impartiality.

(b) The Court's Alleged Barring Creditor from Contacting Witnesses and Denial of Creditor's Discovery Requests

Creditor contends that the Court has "barr[ed] Creditor from any contact with the most relevant witnesses," preventing him from obtaining evidence to defend the UPL Issue, and has issued a "blanket denial" of all discovery requests.[118]

Federal Rule of Civil Procedure 26(b)(1), incorporated by Federal Rule of Bankruptcy Procedure 7026, defines the scope of discovery as the following:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter ***that is relevant to any party's claim or defense and proportional to the needs of the case,*** considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[119]

In other words, Congress has mandated that the Court take into consideration whether the discovery requested is proportional to the needs of the case. With this mandate, the Court determined that discovery should be deferred until Creditor has exhausted his appellate remedies and the issues to be litigated have been determined.[120]

For example, if Creditor had prevailed on Creditor's First Appeal, Debtor would have been found to have waived the UPL Issue and there would be no need for Creditor to contact relevant witnesses (*e.g.*, Debtor's clients) or conduct other discovery on that issue.

Similarly, delays in Creditor's discovery efforts are because the issues to be litigated have yet to be determined. This is demonstrated by the history of Creditor's pending Motion to Compel. Creditor filed his Motion to Compel discovery responses from Debtor on December 6, 2017. At a hearing on January 31, 2018, the Court deferred ruling on Creditor's motion until the Court had ruled on Debtor's Motion for Leave to Amend the Objection to Claim,[121] so the Court would be able to determine the appropriate scope of discovery. On April 4, 2018, the Court ruled on Debtor's Motion for Leave to Amend the Objection to Claim [122] and on April 18, 2018, that Court entered its order granting the motion.[123] On May 1, 2018, Creditor appealed the Court's ruling to the District Court (Creditor's Second Appeal); that appeal is still pending in the Eleventh Circuit.

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[115] Transcript, Doc. No. 186, p. 6, ll. 2-21.
[116] *See* Doc. Nos. 231, 347, 362.
[117] Doc. No. 475.
[118] Doc. No. 467, p. 2.
[119] Emphasis supplied.
[120] Transcript, Doc. No. 400, p. 22, l. 7 - p. 24, l. 13. The issue in Creditor's First Appeal was whether Debtor had waived the UPL Issue by not raising it in the District Court Litigation; in Creditor's Second Appeal, the issue was whether the Court has jurisdiction to rule on the UPL Issue.
[121] Doc. Nos. 389 and 475.
[122] Doc. No. 396.
[123] Doc. No. 398.

This timeline demonstrates that the Court has been in a position to rule on Creditor's Motion to Compel since the Court entered its order granting the Debtor's Motion for Leave to Amend the Objection to Claim on April 18, 2018. But every hearing since April 18 has been postponed while Creditor's Second Appeal and, now, Creditor's Recusal Motion have been pending.

This Court agrees that Creditor is entitled to a meaningful opportunity to conduct discovery on the issues raised in Debtor's Objection to Claim. But given the procedural history of this case, the Court finds that no objective reasonable person would question its impartiality in connection with Creditor's discovery requests.

(c) Debtor's Contention that the Court's Permitting Debtor to Supplement His Objection to Creditor's Claim Was "Inexplicable"

Creditor contends that this Court "inexplicably" allowed further amendments to Debtor's Objection to Claim. But an objection to a proof of claim may be filed at any time.[124] As the District Court stated in Creditor's First Appeal:

> Notably, while the Bankruptcy Rules provide the procedure for a debtor to file an objection to a claim, neither the Bankruptcy Code nor the Bankruptcy Rules provide a calendar-based cutoff point for filing such an objection.[125]

Because an objection to claim transforms the validity of the claim to a contested matter, amendments to objections to claim are governed by Federal Rule of Civil Procedure 15, incorporated by Federal Rule of Bankruptcy Procedure 7015. The decision whether to grant leave to amend is within the sole discretion of the district court.[126] Leave to amend should be freely given when justice so requires.[127]

This Court denied Debtor's first request to amend Debtor's Objection to Claim when Creditor's counsel argued that under Rule 15, pleadings should not be amended where it would cause undue delay, and allowing the amendment to the objection would cause a delay.[128] In denying Debtor's request, the Court considered, in part, the length of time that the parties had been litigating, including in the District Court Litigation.

But, in granting Debtor's Motion for Leave to Amend, the Court considered other factors: there was no trial date set; discovery had not yet commenced; the case had already been delayed for over ninth months while Creditor's First Appeal was pending; and, the District Court had pointed out in its ruling on Creditor's First Appeal that there is no time bar to filing an objection to claim.[129] And, although not stated by the Court as a basis for its ruling, Federal Rule of Bankruptcy Procedure 3008 permits reconsideration of an order allowing or disallowing a claim upon request of a party without setting a deadline for that request.[130] The Court's granting Debtor's Motion for Leave to Amend was not, as Creditor complains "inexplicable," but an exercise of its discretion.

Creditor has twice sought review of the Court's rulings on the UPL Issue. In Creditor's First Appeal, the District Court held that allowing the amendment was within the Court's discretion and that there is no deadline for a debtor to object

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[124] *In re Consol. Pioneer Mortg.*, 178 B.R. 222, 225 (B.A.P. 9th Cir. 1995), aff'd sub nom. *In re Consol. Pioneer Mortg. Entities*, 91 F.3d 151 (9th Cir. 1996); *see also* Fed. R. Bankr. P. 3007.

[125] United States District Court Case No. 2:17-cv-73-SPC, Doc. 29, pp. 8-9.

[126] *Laurie v. Alabama Court of Criminal Appeals*, 256 F.3d 1266, 1274 (11th Cir. 2001).

[127] *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[128] Transcript, Doc. No. 102, p. 10, ll. 17-25 – p. 11, ll. 1-5.

[129] Transcript, Doc. No. 400. United States District Court Case No. 2:17-cv-73-SPC, Doc. 29, pp. 8-9.

[130] *But see In re Mouzon Enterprises, Inc.*, 610 F.3d 1329, 1334 (11th Cir. 2010) (under Fed. R. Bankr. P. 9024, consent order on objection to claim is not "entered without a contest" such that one-year limitation under Fed. R. Civ. P. 60(c) does not apply).

to a claim.[131] In Creditor's Second Appeal, the District Court found that that the Court's ruling on its jurisdiction on the UPL issue "is in line with current case law."[132]

In light of the District Court's rulings, the Court finds that no objective reasonable person would question its impartiality in connection with its granting Debtor's Motion for Leave to Amend.

(d) Debtor's Contention that the Court has "Crossed the Line" in Advocating for Debtor

Creditor argues that the Court became an advocate for Debtor, first, by *sua sponte* reframing Debtor's Objection to Claim when it deemed the UPL Issue raised in Debtor's Cross-Motion for Summary Judgment as an amendment; and second, when Creditor claims the Court instructed Debtor's counsel at a recent hearing that he "knows what to do on a frivolous motion" in reference to a motion filed by Creditor.

i. Debtor's Contention that the Court "Reframed" Debtor's Objection to Claim

The Court did not "reframe" Debtor's Objection to Claim. Debtor raised the UPL Issue in Debtor's Cross-Motion for Summary Judgment. Because Debtor's objection was tantamount to an amendment to his Objection to Claim, the Court deemed the Objection to Claim to be amended to include the UPL issue. The Court, in exercising its discretion to allow an amendment, did not act as an advocate for Debtor or enter into an adverse relationship with Creditor.

An adverse ruling, such as allowing an amendment to Debtor's Objection to Claim, does not constitute a basis for recusal. Judicial rulings not based on an extrajudicial source "almost never constitute valid basis for a bias or partiality motion."[133] A court should recuse only where the opinions of the Court "display a deep-seated favoritism or antagonism that would make fair judgment impossible."[134] Creditor has failed to make such a showing.

Again, the Court finds that no objective reasonable person would question its impartiality in connection with the Court's deeming Debtor's Cross-Motion for Summary Judgment as an amendment to Debtor's Objection to Claim to include the UPL Issue.

ii. The Court's Alleged Advocacy of Debtor Regarding "Frivolous Motions"

Creditor alleges that at the May 23, 2018 hearing, the Court stated to Debtor's counsel that he "knows what to do on a frivolous motion." The Court has carefully reviewed the transcript of the May 23, 2018,[135] as well as the transcripts from hearings over the course of the past year, and cannot find those words or words to that effect.

But even if the Court did say something about Debtor's counsel knowing "what to do on a frivolous motion," such a statement does not rise to a level mandating the Court's recusal. In effect, Creditor complains that the Court made a statement disparaging a motion filed by Creditor. But courts have found that a judge's expression of doubt about the merits of a particular case or motion at a pretrial proceeding does not constitute grounds for recusal.[136]

After careful review of the record, and even assuming that the Court made a statement to the effect alleged by Creditor, the Court finds that no objective reasonable person would question its

[131] District Court Case No. 2:17-cv-73-SPC, Doc. No. 29.
[132] District Court Case No. 2:18-cv-309-JES, Doc. No. 14, p. 7.
[133] *Liteky*, 510 U.S. at 555.
[134] *Id*.
[135] Doc. No. 444.
[136] *See United States v. Wilkerson*, 208 F.3d 794, 798 (9th Cir. 2000); *see also Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1061 (N.D. Ga. 1990) (finding that court's comments "on the merits of [the] case during the course of the pretrial settlement conference" did not give rise to a basis for recusal); *Fed. Deposit Ins. Corp. v. Glickman*, 450 F.2d 416, 419 (9th Cir. 1971) ("A district judge is given broad discretion in supervising the pre-trial phase of litigation, with a view toward sifting the issues in order that the suit will go to trial only on questions involving honest disputes of fact or law.").

impartiality in connection with this case. For example, the Court granted Creditor's First Motion for Summary Judgment; the Court denied Debtor's Cross-Motion for Summary Judgment; the Court granted Creditor's Motion to Rescind AEO Order; the Court has permitted Creditor to attend hearings telephonically; the Court granted Creditor CM/ECF filing privileges; and the Court has permitted Creditor's former counsel, Mr. Dal Lago, to hold $500,000.00 of funds claimed by Debtor pending this Court's substantive rulings on Debtor's Objection to Claim and the Bad Faith Motion.

(e) The Court Has Not Violated Creditor's Constitutional Due Process Rights under the Fifth and Fourteenth Amendments.

Creditor contends that the examples he cites to support his allegations of bias also demonstrate that the Court has violated his constitutional due process rights. And Creditor argues that the Court's denying him access to discovery has violated his rights under the Fifth and Fourteenth Amendments.

But the Court has broad discretion over discovery[137] and has the affirmative duty to take into consideration whether the discovery requested is proportional to the needs of the case.[138] Here, the Court in its discretion, and in an effort to avoid duplication of efforts, found that delaying discovery while Creditor's interlocutory appeals were pending was the appropriate course to take in managing Debtor's bankruptcy case and Debtor's Objection to Claim.[139]

The Court has not denied Creditor the right to address the issues raised in Debtor's Objection to Claim. When Creditor's Second Appeal has concluded, Creditor will be afforded the opportunity to conduct discovery that is proportionate to the needs of the case and to a trial on the Objection to Claim.

D. CONCLUSION

In considering Creditor's Recusal Motion, the Court has undertaken an exhaustive review of the record in this case, including the parties' motions, hearing transcripts, and Court orders. The Court concludes that Creditor's allegations do not establish a deep-seated favoritism towards Debtor or an antagonism towards Creditor.

Although this Court has a duty to recuse if any of the statutory grounds exist, Creditor's allegations, even taken as a whole, do not constitute grounds for recusal. While Creditor may be unhappy with the Court's procedural rulings, this does not form the basis for the Court to recuse itself. And the Court is bound by a corresponding duty not to recuse itself if cause for recusal has not been shown. Given the complex procedural posture of this case and its extensive history, recusal would serve only to burden one of the Court's colleagues, would result in judicial inefficiency, and would delay this case further.

Accordingly, it is

ORDERED that the Recusal Motion is **DENIED**.

DATED: September 7, 2018.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge

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[137] *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1269 (11th Cir. 2001); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997) ("district courts enjoy broad discretion in deciding how best to manage the cases before them").

[138] Fed. R. Civ. P. 26.

[139] *United States v. McCutcheon*, 86 F.3d 187, 190 (11th Cir. 1996) (finding that court has broad discretion to manage its own docket).