

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:01-bk-00533-ABB
Chapter 11

EVERGREEN SECURITY, LTD.,

Debtor.

ORDER

This matter came before the Court on Evergreen Security, Ltd.'s Motion to Exclude the Honorable Arthur B. Briskman, Bankruptcy Judge for the Middle District of Florida, as Witness (Doc. 1537) ("Motion") filed by R.W. Cuthill, Jr., the President of the Debtor Evergreen Security Ltd. ("Evergreen") and the Memorandum in Opposition (Doc. 1543) ("Opposition") filed by Jon M. Knight, J. Anthony Huggins, Atlantic Portfolio Analytics & Management, Inc., International Portfolio Analytics, Inc., and Mataeka, Ltd., the Movants herein (collectively, the "Movants").¹ An evidentiary hearing was held on October 11, 2006 at which counsel for Evergreen, counsel for the Movants, counsel for R.W. Cuthill, and the Chapter 7 Trustee for three related involuntary cases appeared.² The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

The Movants filed a Motion for Recusal, Motion to Disqualify, Disclosure of All Ex Parte Communications and Revocation of All Prior Orders (Doc. No. 1508) ("Recusal Motion") on July 27, 2006 seeking, among other things, recusal of the undersigned Judge from further involvement in this case and various other cases involving the Movants.³

¹ Mataeka, Ltd. is named as a Movant in the opening and closing paragraphs of the Opposition, but is not included in as a represented party in counsels' signature blocks.

² The involuntary cases are: In re Jon M. Knight, Case No. 6:06-bk-01547-ABB; In re J. Anthony Huggins, Case No. 6:06-bk-01546-ABB; In re Atlantic Portfolio Analytics & Management, Inc., Case No. 6:06-bk-01549-ABB.

³ The Petitioners seek the undersigned's recusal from the Evergreen case and: In re Jon M. Knight, Case No. 6:06-bk-01547-ABB, Involuntary Chapter 7; In re J. Anthony Huggins, Case No. 6:06-bk-01546-ABB, Involuntary

They filed a Petition for Writ of Mandamus⁴ with the United States District Court for the Middle District of Florida, Orlando Division ("District Court") on August 14, 2006, thereby instituting Mataeka, Ltd., et al. v. United States District Court, et al., Case No. 6:06-cv-01210-JA-KRS. They filed a Supplemental Petition for Writ of Mandamus with the District Court on August 21, 2006 seeking a Writ of Mandamus requiring the undersigned's recusal from this case and all related proceedings and to refrain from ruling on the Recusal Motion because the Movants intend on calling the undersigned as a witness at the final evidentiary hearing on the Recusal Motion.⁵

The District Court entered an Order on September 20, 2006 ("Order") denying the mandamus petition and the supplemental petition.⁶ The District Court found no basis for the issuance of a writ of mandamus:

Mandamus is a drastic remedy to be invoked only in extraordinary circumstances. Petitioners assert that the bankruptcy judge's refusal to disqualify himself in response to the motion constitutes such an extraordinary circumstance. The bankruptcy judge has not, however, refused to rule on the motion to disqualify . . . There is no reason to believe that a ruling will not be made promptly following the hearing. If, upon entry of the order, Petitioners believe the bankruptcy judge's decision to be erroneous, they have the readily available remedy of appealing the decision.

Order at p. 2 (*citations omitted*).

The final evidentiary hearing on the Recusal Motion was set for October 24, 2006. The parties jointly requested a continuance of the hearing date due to the unavailability of their respective expert witnesses (Doc. No. 1531). Their continuance request was granted in open Court on October 11,

Chapter 7; In re Atlantic Portfolio Analytics & Management, Inc., Case No. 6:06-bk-01549-ABB, Involuntary Chapter 7; R.W. Cuthill, Jr., Trustee v. Mataeka, Ltd., et al., Adv. Pro. No. 6:01-ap-00232-ABB; and R.W. Cuthill, Jr., Trustee v. International Portfolio Analytics, Inc., et al., Adv. Pro No. 6:03-ap-00035-ABB

⁴ District Court Doc. No. 1.

⁵ District Court Doc. No. 3.

⁶ District Court Doc. No. 23.

2006 and the hearing has been reset for November 28, 2006 based upon the earliest available dates for the parties and the Court. The final evidentiary hearing on the Recusal Motion constitutes a trial.

The parties, pursuant to the scheduling orders governing the Recusal Motion (Doc. Nos. 1510, 1524), filed witness and exhibit lists. Movants set forth in their Disclosure of Time Estimates and Exhibits and Witnesses (Doc. No. 1520) their intention to call the undersigned as a witness. Evergreen filed a witness list (Doc. No. 1519) setting forth it intends to call "all witnesses on Movants' witness list," but has clarified it will not call the undersigned as a witness.

The undersigned's involvement in this case and the related cases has been in a judicial capacity. The undersigned's knowledge of these cases was gained in the undersigned's judicial capacity. The undersigned may not be called as a witness or subjected to discovery regarding the Recusal Motion.

CONCLUSIONS OF LAW

Legal and policy considerations prevent a judge who is presiding over a trial from being called as a witness or subjected to discovery. Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570, 1580-81 (M.D. Ga. 1992). "The legal obstacle is Rule 605 of the Federal Rules of Evidence." Id. "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." FED. R. EVID. 605.

"Trial" as used in Rule 605 encompasses any evidentiary hearing. Cheeves v. Southern Clays, Inc., 797 F. Supp. at 1582. A judge presiding in a recusal matter is incompetent to testify as a witness pursuant to Federal Rule of Evidence 605. Id.; United States v. Roebuck, 271 F. Supp. 2d 712, 720 (D. V.I. 2003) ("A search by this Court revealed no case where a judge has been required to submit to discovery or compelled to testify in connection with a motion for his disqualification."); United States v. Jonnet, 597 F. Supp. 999, 1003 (W.D. Pa. 1984) (quashing subpoena served on judge presiding over recusal motion hearing).⁸

⁷ Movant's motion for recusal was denied in United States v. Roebuck, 289 F. Supp. 2d 678 (D. V.I. 2004) and his petition for writ of mandamus was denied in United States v. Roebuck, 95 Fed. Appx. 463 (3d Cir. 2004).

⁸ Defendant's conviction of giving false testimony reversed by United States v. Jonnet, 762 F.2d 16 (3d Cir. Pa. 1985).

Policy considerations prohibit a presiding judge from being called as a witness or subjected to discovery. Cheeves v. Southern Clays, Inc., 797 F. Supp. At 1582-83. "Embroiling the presiding judge in the adversarial process of any case is not only unseemly," . . . but it will lead to the "manipulated harassment" of the judiciary. Id. The core policy considerations in excluding a presiding judge from the adversarial process are "accurate fact-finding and preserving the appearance of fairness even where accuracy is not seriously threatened." 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6062, at 342 (1990); *see also* CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 2 ("[A] judge . . . should not lend the prestige of his office to advance the private interests of others. . . .").

"The functions of a judge and a witness are incompatible and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time." Cline v. Franklin Pork, Inc., 313 N.W.2d 667, 671 (Neb. 1981). A judge may not be compelled to testify regarding his mental processes used in formulating a decision, the reasons or motivations for performing official duties, or facts learned during the judicial process. *See, e.g.*, United States v. Morgan, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941); Fayerweather v. Ritch, 195 U.S. 276, 306-07, 49 L. Ed. 193, 25 S. Ct. 58 (1904); Grant v. Shalala, 989 F. 2d 1332, 1344 (3d 1993); United States v. Roth, 332 F. Supp. 2d 565, 568 (S.D.N.Y. 2004).

The undersigned's involvement in and knowledge of these cases is through his judicial capacity. Statutory law and fundamental policy considerations governing the judiciary prevent the undersigned from being called as a witness or subjected to discovery regarding the Recusal Motion.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Evergreen's Motion is hereby **GRANTED**.

Dated this 30th day of October, 2006.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

The defendants did not appeal the ruling quashing the subpoena.