APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-2209

In re: PHILIP JAY FETNER,
Debtor,

PHILIP JAY FETNER,
Debtor - Appellant,

v.

KEVIN R. MCCARTHY,
Trustee - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, Senior District Judge. (1:20-cv-00316-AJT-MSN)

Submitted: June 24, 2021 Decided: June 28, 2021

Before KING and THACKER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Philip Jay Fetner, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Philip Jay Fetner appeals the district court's orders dismissing his bankruptcy appeal and denying reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Fetner v. Hotel St. Cap., L.L.C.*, No. 1:20-cv-00316-AJT-MSN (E.D. Va. Aug. 26, 2020 & Oct. 7, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2209
(1:20-cv-00316-AJT-MSN)

In re: PHILIP JAY FETNER,
Debtor,

PHILIP JAY FETNER,
Debtor - Appellant,

v.

KEVIN R. MCCARTHY,
Trustee - Appellee.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:

PHILLIP JAY FETNER,
Appellant-Debtor.

KEVIN R. MCCARTHY as Chapter 7 Trustee,
Plaintiff,

v.

PAUL MORRISON, *et al.*,
Defendants.

Case No. 17-13036-KHK
Chapter 7 (Conversion)

Civil Action No. 1:20-cv-316 (AJT/MSN)

Adv. Pro. 19-01039

ORDER

On September 8, 2020, Appellant Philip Jay Fetner filed a Motion to Reconsider or for Rehearing

[Doc. 14] (the "Motion") of the Court's August 26, 2020 Order [Doc. 13] denying Appellant's appeal. Upon consideration of the Motion, the Court finds that there are no valid grounds upon which to reconsider its August 26, 2020 Order. Accordingly, it is hereby

ORDERED that Appellant's Motion to Reconsider or for Rehearing [Doc. 14] be, and the same hereby is, **DENIED**; and it is further

ORDERED that the hearing in the above-captioned matter currently scheduled for Friday, November 6, 2020 at 10:00 a.m. be, and the same hereby is, **CANCELLED**.

The Clerk is directed to forward a copy of this order to all counsel of record, and to the *pro se* Appellant at the address listed on the Notice of Appeal.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
October 7, 2020

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:

PHILLIP JAY FETNER,
Appellant-Debtor.

KEVIN R. MCCARTHY as Chapter 7 Trustee,
Plaintiff,

v.

PAUL MORRISON, *et al.*,
Defendants.

Case No. 17-13036-KHK
Chapter 7 (Conversion)

Civil Action No. 1:20-cv-316 (AJT/MSN)

Adv. Pro. 19-01039

ORDER

Appellant-Debtor Philip Jay Fetner ("Debtor"), proceeding *pro se,* has filed an appeal from a March 5,

2020 order denying Debtor's Motion for Recusal issued by the United States Bankruptcy Court for the Eastern District of Virginia (the "Bankruptcy Court"). In this appeal, Debtor asks this Court to recuse the Honorable Judge Klinette Kindred from presiding over his bankruptcy case, Bankr. Case No. 17-13036-KHK (the "Bankruptcy Case"), on the grounds that she, *inter alia,* is biased and prejudiced against Debtor and maintained undisclosed conflicts of interest.

This Court reviews a judge's recusal decision for abuse of discretion. *Kolon Indus. v. E.I. Dupont De Nemours & Co.,* 748 F.3d 160, 167 (4th Cir. 2014) (citing *United States v. Mitchell,* 886 F.2d 667, 671 (4th Cir. 1989)).

Pursuant to Federal Rule of Bankruptcy Procedure 5004, bankruptcy judges are governed by 28 U.S.C. § 455. Section 455 provides in pertinent part that a judge "shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned" or "[w]here [she] has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a), (b)(1). Thus, under § 455(a), a bankruptcy judge must ask herself whether a reasonable person knowing all the relevant facts would question her impartiality. *See Reed v. Rhodes,* 179 F.3d 453, 467 (6th Cir. 1999). And as to § 455(b)(1), the inquiry is whether the judge has a personal bias or prejudice against the moving party.

In moving to recuse a judge, the moving party must allege "facts which a reasonable person would

believe would indicate a judge has a personal bias against the [Debtor]. Conclusions, rumors, beliefs, and opinions are not sufficient to form a basis for disqualification." *Gen. Aviation, Inc. v. Cessna Aircraft Co.,* 915 F.2d 1038, 1043 (6th Cir. 1990) (internal citations omitted); *see also Liteky v. United States,* 510 U.S. 540, 551 (1994) (there must exist some "genuine question concerning a judge's impartiality"); *United States Gordon,* 61 F.3d 263, 267 (4th Cir. 1995) (partiality requires an apparent "wrongful or inappropriate" disposition towards a party). This is an objective standard. The test asks "whether the judge's impartiality might be questioned by a reasonable, well-informed observer who assesses all the facts and circumstances." *United States v. DeTemple,* 162 F.3d 279, 287 (4th Cir. 1998). A reasonable, well-informed observer "is not a person unduly suspicious or concerned about a trivial risk" that a judge may be partial. *Id.* As such, a judge is not required to recuse herself simply "because of unsupported, irrational, or highly tenuous" allegations of bias. *Id.* Moreover, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . .. ." *Liteky,* 510 U.S. at 555.

Before denying the Debtor's motion to recuse, the Bankruptcy Court thoroughly reviewed the history of the Debtor's bankruptcy case. In doing so, it noted that, when the Debtor filed the bankruptcy case, he was nearly four years in arrears on his mortgage payments; that he had made no monthly payments to the mortgagor during the pendency of his bankruptcy case; that throughout the case, Debtor maintained that because he has only an equitable interest in his

mortgaged residence, that property is not property of the estate, within the meaning of the Bankruptcy Code; and that Debtor never sought to market (or sell) the property during the period of time he was a debtor-in-possession. These behaviors, the Bankruptcy Court noted, were inconsistent with the purposes of the Bankruptcy Code. The Bankruptcy Court also noted that the Debtor, to his credit, has raised no suspicions or evidence of "hard" corruption by the Court. Instead, Debtor only points to "soft bias," grounded in the Debtor's suspicion that the Bankruptcy Court seeks to achieve a predetermined result-viz–, the liquidation of his secured residence to pay his creditors. Against that background, the Bankruptcy Court concluded that "Mr. Fetner [Debtor] presents no facts or objective arguments that reasonably demonstrate [the Bankruptcy] Court's prejudice or bias in this case." Bankruptcy Case, [Doc. 105] at 6.

Based on the above, the Court finds that Judge Kindred did not abuse its discretion by refusing to recuse herself from the case. The Debtor has not referred this Court to any objective evidence in the record that supports his assertion that Judge Kindred's findings and conclusions were biased or prejudiced.[1] To the contrary, as found by the Bankruptcy Court, the Debtor's assertions that the bankruptcy judge was biased and prejudiced is

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[1] Instead, Debtor's brief in this matter–62 pages long–consist largely of legal attacks disagreeing with the Bankruptcy Court's decisions. *See generally* [Doc. 9]. As stated above, mere disagreement with a court's decisions is not an adequate basis to recuse a judge.

unsubstantiated by the record and undermined by the factual evidence that supported the Bankruptcy Court's decisions.

Accordingly, based on the foregoing, it is hereby

ORDERED that the Bankruptcy Court's March 5, 2020 Memorandum Opinion and Order be, and the same hereby is, **AFFIRMED;** and it is further

ORDERED that this appeal be, and the same hereby is, **DISMISSED.**

This is a Final Order for purposes of appeal. To appeal, Debtor must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order Debtor wants to appeal. Debtor need not explain the grounds for appeal until so directed by the Court.

The Clerk is directed to forward a copy of this Order to all counsel of record, and to the *pro se* Appellant-Debtor at the address listed on the Notice of Appeal.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
August 26, 2020

APPENDIX D

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria, Division

In re:

Phillip J. Fetner
Debtor

Kevin R. McCarthy
Plaintiff

v.

Hotel Street Capital, LLC, et.al,
Defendants

Case No. 17-13036-KHK
Chapter 7

Adversary Proceeding
No. 19-1039-KHK

MEMORANDUM OPINION

Before the Court is Philip Jay Fetner's ("Fetner" or "debtor") Motion to Approve Debtor's Motion for Recusal ("Recusal Motion"). (Docket. No. 98). Creditor

Hotel Street Capital, LLC has filed an Objection to the recusal motion. (Docket. No. 103). For the reasons that follow, this motion will be DENIED.

Background

Mr. Fetner filed a petition under Chapter 11 of the Bankruptcy Code on Sept. 7, 2017. His schedules list $7,629,496 in assets, including $2,498,996 in claims against third parties and a $5,000,000 equitable interest in a limited partnership he controls that owns the property known as Coachman Farms where the debtor resides.[2] (Docket No.14). His schedules list no secured creditors and $3,698,621.80 in unsecured claims; all of the listed claims are disputed except for two claims valued at under $36,000. *Id.* Three creditors have submitted proofs of claims in the case asserting a secured interest in Coachman Farms. Their claims total $2,716,919.95. The remaining unsecured claims are valued at $852,757.98 in total. *See* Proofs of Claim Nos. 1-6.

On February 5, 2018, the Court entered an Order which granted the debtor's uncontested motion to extend the exclusivity period to file a plan of reorganization to June 5, 2018. Mr. Fetner's second motion to extend the exclusivity period was hotly contested by his creditors and on July 16, 2018, the

[2] The debtor is the Trustee and sole Beneficiary of Jay's Trust B U/I William W. Fetner Trust dated August 15, 2000 which, as Limited Partner, owns 99% of the PJF Limited Partnership. The debtor, as General Partner, owns 1% of PJF Limited Partnership.

Court entered an Order denying the debtor's request.[3] (Docket No. 94).

On August 14, 2018, a creditor in the case filed a disclosure statement and plan that was never confirmed. (Docket No. 114). Eight months later, Mr. Fetner filed a disclosure statement and plan. (Docket No. 197). On May 30, 2019, the Court entered an Order denying approval of the disclosure statement filed by the debtor because it: (1) proposed to modify the terms of loans secured by the debtor's principal residence; (2) provided for an improper release of a federal tax lien; and (3) failed to provide proper treatment of administrative claims in the case.[4] (Docket No. 213).

The Court held a hearing on the U.S. Trustee's Motion to Convert this case to a chapter 7 case on June 11, 2019 and determined that the debtor lacked sufficient monthly income to support the projected

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[3] Mr. Fetner appealed the Order denying his second motion to extend the exclusivity period to file a plan. Docket No. 94. On September 26, 2019, the U.S. District Court affirmed the Bankruptcy Court's decision. *See Fetner v. Hotel Street Capital, et al.,* Case No.: 18-cv-00933. Mr. Fetner has appealed the matter to the 4th Cir. Court of Appeals where it is now pending as Case No. 19-3219.

[4] Mr. Fetner appealed the Order rejecting the proposed Chapter 11 disclosure statement. (Docket No. 213). On September 9, 2019, the U.S. District Court dismissed the appeal for lack of jurisdiction. *See Fetner v. Fitzgerald,* Case No.: 19-cv-00780. Mr. Fetner appealed the dismissal to the 4th Cir. Court of Appeals where it is now pending as Case No. 19-2305.

plan payments that would begin if the plan were confirmed. The Court also found that the timeline for future income streams was obscure and that the debtor had grossly mismanaged his estate. For these reasons, the Court entered an Order converting the case to chapter 7 on June 13, 2019.[5] (Docket No. 225).

While the bankruptcy was still pending under chapter 11, Mr. Fetner filed a state court action against several parties and their counsel, including parties that are creditors in this case. The Complaint included claims for legal malpractice, breaches of contract, conspiracy, defamation, fraud, RICO violations and other tort claims. That matter was removed to this Court on March 25, 2019. (Adversary Proc. ("AP") No. 19-1039, Docket 1). At the conclusion of hearings on motions to dismiss the Complaint filed by several defendants, this Court dismissed Counts XIII and IV of the Complaint and took the remaining twelve Counts under advisement. (AP Docket Nos. 36-42). Thereafter, on August 30, 2019, the Court entered an Order Granting Motion to Substitute Kevin McCarthy, Chapter 7 Trustee as Plaintiff in the

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[5] Mr. Fetner appealed the Order converting the case from Chapter 11 to Chapter 7 (Docket No. 225). On September 9, 2019, the U.S. District Court granted the U.S. Trustee's Motion to Dismiss his Appeal. *See Fetner v. Wilmington Savings Fund Society,* Case No.: 19-cv-00899. Mr. Fetner appealed the dismissal to the 4th Cir. Court of Appeals where it is now pending as Case No. 19-2303.

adversary proceeding.[6] (AP Docket No. 82).

Standard of Review

28 U.S.C.A. §455(b) provides that any judge of the United States shall disqualify himself where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

When considering a motion to recuse brought under 28 U.S.C. § 455, a court must apply the objective standard of whether a reasonable observer "with knowledge of all of the circumstances might reasonably question the judge's impartiality." *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987) (citing *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

Discussion

Several pertinent cases address the issue of recusal. In *Liteky v. United States*, the Supreme Court held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceeding, or prior proceedings, do not constitute a basis for a bias or partiality motion unless

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[6] Mr. Fetner appealed the Order granting the motion to substitute the chapter 7 trustee as plaintiff in the adversary proceeding (AP Docket No. 82). On February 10, 2020, the U.S. District Court dismissed the appeal. *See Fetner v. McCarthy*, Case No.: 19-cv-01178. The deadline to appeal the dismissal is March 10, 2020.

they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion . .. they are proper grounds for appeal, not for recusal." *Id.* at 555. Judicial remarks that are 'critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" *Id.* "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display, even after having been confirmed as federal judges," do not establish bias or partiality. *Id.* at 555-56. Similarly, "a judge's ordinary efforts at courtroom administration ... are immune" from disqualifications motions. *Id.* at 556.

In *In re Loy*, the court found the debtor's allegations regarding the impartiality of the judge amounted to nothing more than disagreements and complaints about rulings issued within the context of the debtor's chapter 7 case. "That alone, pursuant to the statutes and case law, is insufficient as grounds for recusal." *In re Loy*, No. 07-51040-FJS, 2011 WL 511846 2, at *2 (Bankr. E.D. Va. 2011).

In *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, the court held that "in weighing recusal, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality simply might be trying to avoid what they apprehend

may be an adverse ruling." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 847 F. Supp. 2d 843, 861 (E.D. Va. 2012) (citing *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

In *United States v. Farkas*, Judge Brinkema held that a judge is entrusted with discretion in the first instance to determine whether to disqualify herself "because the judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion." *United States v. Farkas*, 149 F. Supp. 3d 685, 691 (E.D. Va. 2016), aff'd, 669 F. App'x 122 (4th Cir. 2016). This is especially true when that judge has presided over a lengthy proceeding. *Id.* Moreover, "a court is not bound to accept the movant's factual allegations within the motion as true." *Beard*, 811 F.2d at 827.

When the debtor filed this case, the mortgage payments owed to the lender in the first position on the property he occupies were nearly four years in arrears. (Proof of Claim No. 2-1). While in Chapter 11, Mr. Fetner's monthly operating reports indicate he made no payments to that lender. Throughout this case, the debtor has maintained that, even though he controls the entities that own his residence, he has no more than an equitable interest in Coachman Farms and therefore it should not be treated as property of the bankruptcy estate. However, he treated the property as his own when, in his disclosure statement he proposed to offer the property as security for his promise to pay the creditors whose claims he continues to dispute. In other words, the debtor intended to keep

enjoying all of the benefits of owning Coachman Farms without acknowledging in his plan the rights of those creditors and without a firm commitment to pay for his residence. This behavior is inconsistent with the conduct of the poor but honest debtor that the Bankruptcy Code is designed to protect.

To his credit, Mr. Fetner admits in his recusal motion that he has no suspicion or evidence of "hard" corruption by this Court. Instead, he accuses the Court of "soft corruption", "soft bias", and manipulating the bankruptcy process to achieve a predetermined result, that of liquidating the only tangible asset of value in this estate to pay his creditors. However, in retrospect his argument fails. There was no rush to liquidate. In fact, even though the assets of this case are no longer under the debtor's control, Coachman Farms remains a part of the estate, and to date, the trustee bas made no attempt to market the property while he pursues other potential assets. Ultimately, Mr. Fetner had more than one and one-half years to show his creditors and the Court that he could propose a confirmable plan that would allow him to pay his just debts. He simply failed to do so, and the consequence of his failure was conversion of the case to chapter 7.

Finally, even though the debtor has exercised his right to appeal several Orders of this Court, those Orders have been affirmed or his appeals have been dismissed by the U. S. District Court. It remains to be seen whether the 4th Circuit Court of Appeals will reverse any of the District Court's decisions.

In conclusion, Mr. Fetner presents no facts or objective arguments that reasonably demonstrate this Court's prejudice or bias in this case. "[W]hen there is no reasonable basis for questioning a judge's impartiality, it is improper for the presiding judge to recuse himself." *Wallace v. Baylouny*. No. 1:16-CV-0047, 2016 WL 2868865, at *4 (E.D. Va. May 17, 2016) (quoting *Kidd v. Dalkon Shield Claimants Trust*, 215 **B.R.** 106, 109 (citing *United States v. Glick*, 946 F.2d 335, 336-37 (4th Cir. 1991)) . Accordingly, the Court will deny the recusal motion. The Court will enter an order consistent with this memorandum opinion.

Date: Mar 5 2020

/s/ Klinette H. Kindred
Klinette H. Kindred
United States Bankruptcy Judge

Entered on Docket: March 5, 2020

Copy to:

Phillip J. Fetner
7676 Stoney Hill Lane
The Plains, VA 20198

Electronic copies to:

John T. Donelan
Jack Frankel
Bradford F. Englander

Kevin R. McCarthy
Jeffrey H. Geiger
Klementina V. Pavlova
John E. Coffey
Madeline A. Trainer
Michelle B. Jessee
William L. Mitchell, II
William D. Ashwell
Rebecca L. Dannenberg

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria, Division

In re:

Phillip J. Fetner
Debtor

Kevin R. McCarthy
Plaintiff

v.

Hotel Street Capital, LLC, et.al,
Defendants

Case No. 17-13036-KHK
Chapter 7

Adversary Proceeding
No. 19-1039-KHK

ORDER DENYING MOTION FOR RECUSAL

On March 3, 2020, the Court held a hearing on the Debtor's Motion for Recusal. (Docket No. 98). The Debtor appeared *pro se,* along with John E. Coffey, Counsel for Hotel Street Capital, LLC and Rebecca L. Dannenberg, Counsel for Robin Gulick and Gulick, Carson & Thorpe, P.C. For the reasons stated in the

Memorandum Opinion filed contemporaneously with this Order. It is **ORDERED:**

1. The Debtor's Motion for Recusal is DENIED.

2. The Debtor is advised that he will have 14 days from the entry of this Order to appeal by filing a Notice of Appeal with the Clerk of the Bankruptcy Court.

3. The Clerk will mail a copy of this order, or give electronic notice of its entry, to the parties listed below.

Date: Mar 5 2020
Alexandria, Virginia

/s/ Klinette H. Kindred
Klinette H. Kindred
United States Bankruptcy Judge

Entered on Docket: March 5, 2020

Copy to:

Phillip J. Fetner
7676 Stoney Hill Lane
The Plains, VA 20198

Electronic copies to:

John T. Donelan
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John E. Coffey
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Rebecca L. Dannenberg

APPENDIX E

FILED: October 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2209
(1 :20-cv-00316-AJT-MSN)

In re: PHILIP JAY FE1NER
Debtor

PHILIP JAY FE1NER
Debtor - Appellant,

v.

KEVIN R. MCCARTHY
Trustee - Appellee

ORDER

The court denies the petition for rehearing and rehearing en bane. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Thacker, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk