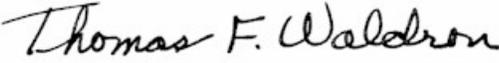


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: March 01, 2007


Thomas F. Waldron
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: TOMMY M. MOSLEY
SUSAN K. MOSLEY,

Debtors

Case No. 05-42014
Adv. No. 05-3480

BILLIE J. STURGILL,

Plaintiff

Judge Waldron
Chapter 7

v.

TOMMY M. MOSLEY,

Defendant

**DECISION DENYING MOTION FOR
DISQUALIFICATION OF THE HON.
THOMAS F. WALDRON**

DATED AT DAYTON, OHIO this 1st Day of March, 2007:

Parties' Filings

Pending before the court is the recent filing by Mary K. C. Soter, attorney for the Plaintiff (the "Movant"), titled *Motion For Disqualification Of The Hon. Thomas F. Waldron* (Doc. 118), which provides, in part:

Now comes the Plaintiff and moves the Court for an order disqualifying the Hon. Thomas F. Waldron in the within adversarial action based upon 28 USC § 455 Disqualification of justice, judge, or magistrate judge, due to the fact that the impartiality of the said Judge might reasonable be questioned, and the Judge harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute, as is more fully set forth in the Memorandum and Affidavit below.

This motion is accompanied by an Affidavit which provides:

Mary K. C. Soter, being first duly cautioned and sworn, states that she believes that due to his antagonism toward her, including the statements made on the record at the hearing held February 7, 2007, in which he had prejudged the case and advised Mrs. Soter that "it is not going to go very well for you today" prior to hearing any testimony or seeing any evidence, and his false accusations that she had been the subject of discovery violations every time she had been before him, that this Judge is unable to give Mrs. Billie J. Sturgill a fair and impartial trial.

Affiant further states that she has not been the subject of a Motion to Compel in the United States Bankruptcy Court in the past, has never been found guilty of any discovery violation in thirty-one years of practice, and the allegations made by the Judge against her were totally false.

The motion further contains, as *Plaintiff's Exhibit A*, a transcript of a hearing held February 7, 2007 (the "Hearing").

Also filed is the *Response Of Defendant Tommy M. Mosley To Plaintiff's Motion For Disqualification* (Doc. 121), which provides, in part:

Discovery

In October 2006 undersigned counsel sent a letter to opposing counsel requesting, inter alia, production of all bank statements, check registers, and cancelled checks on any account on which Plaintiff was the signor, for

the period of time in question in this litigation. In response thereto, Plaintiff produced Fifth Third Bank statements at her deposition. Further, at her deposition, Plaintiff testified that her 2003 and 2004 Key Bank statements were in her possession. Yet, as of the hearing on the discovery issue, Plaintiff had not produced those bank statements. The fact that Plaintiff testified that she had possession of those bank statements and that they had not been produced was clearly made known in the discovery dispute pleadings preceding the hearing. At the hearing, it was only after that fact was again brought up by undersigned counsel (page 6 of the transcript) that the exact documents that had been requested in October and admitted to be in Plaintiff's possession in early November were actually produced in open court. Plaintiff produced no evidence that those documents had been previously provided. Simply put, Plaintiff's counsel had a duty to provide the documents that were requested in October and to make diligent inquiry to ensure that the discovery requests was correctly responded to. The Court succinctly analyzed the situation when it advised Ms. Soter that it appeared that she did not understand the discovery issue.

* * * * *

Admonishment

There is a huge difference between a court administering an admonishment and a court being biased and prejudiced. In the instant case, the Trial Court (as it always does) reviewed the arguments of counsel and the proposed exhibits in advance of the hearing. The Trial Court had before it an October 2006 letter requesting production of bank statements and a copy of the transcript testimony of the Plaintiff's deposition, wherein she admitted to being in possession of Key Bank statements for 2003 and 2004. The Trial Court also knew that those bank statements had not been produced. That being the case, advising a lawyer on the wrong end of that fact situation that a discovery hearing is not going to go well for them is nothing more than common courtesy and a statement of fact.

Further, it is axiomatic that if a judge asks a lawyer a question in open court, the lawyer would be well advised to answer the question asked.

“Mrs. Soter, you see how easy it has become. Any reason why your client doesn't have the statements and check registers and bank statements that Mr. Hollencamp has asked for?”

When opposing counsel didn't answer the question asked the Court redirected her attention to the question and rephrased it.

“Now I’m asking you again, does she have these records Mrs. Soter?”

It is only after opposing counsel still didn’t answer the question asked that the Court admonished opposing counsel: “How many times do I have to repeat it?”. That admonishment was successful. The question was answered and the issue was resolved. In short, opposing counsel was admonished and deserved to be admonished – as well as sanctioned.

This *Decision Denying Motion For Disqualification Of The Hon. Thomas F. Waldron* addresses these filings. (Docs. 118, 121)¹.

Issue Presented

The issue presented is whether Judge Thomas F. Waldron (the “Trial Judge”) is disqualified from determining the issues in this adversary proceeding.

Issue Determined

The court determines that the Trial Judge is not disqualified and shall conduct the trial of the issues in this adversary proceeding.

Parties’ Arguments

The central arguments presented by the Movant are: (1) “**Prejudging**” – the Trial Judge “prejudged the case and advised Mrs. Soter that “[t]his is not going to go very well for you today” prior to hearing any testimony or seeing any evidence” and (2) “**False Accusations**” – the Trial Judge made “false accusations that she had been the subject of discovery violations every time she had been before him[.]” This is followed by the Movant’s conclusion that the Trial Judge “is unable to give Mrs. Billie J. Sturgill a fair and impartial trial.” (Doc. 118).

¹ The Court recognizes there are other pending filings – *Supplemental Memorandum of Defendant Tommy M. Mosley Regarding Discovery Dispute* (Doc.75), *Affidavit of Arthur R. Hollencamp* (Doc. 76), *Affidavit of Mary K. C. Soter in Opposition to Affidavit Of Arthur R. Hollencamp Regarding Defendant’s Request For Attorney Fees* (Doc. 79), *Defendant’s Motion to Dismiss* (Doc. 119), *Defendant’s Objection To Certain of Plaintiff’s exhibits* (Doc. 120) – which will be addressed prior to the trial date.

The Defendant argues in opposition that:

The Court evidenced no bias or prejudice. Rather, the Court exercised extreme restraint under the circumstances. The Court's impartiality cannot reasonably be questioned. An appropriate admonishment of counsel in a tangential hearing does not override the extreme leniency, lack of bias, and lack of prejudice that has been bestowed upon opposing counsel to date in these proceedings. The Motion for Disqualification should be overruled. (Doc. 121).

Applicable Law

An extremely thorough decision by Judge Hoffman provides the legal principles for the determination of these issues. Judge Hoffman noted:

While 28 U.S.C. § 455 imposes a duty on the Court to recuse where any of the statutory grounds exist, there is a corresponding duty not to do so if cause for recusal has not been shown. *In re Computer Dynamics, Inc.*, 253 B.R. 693, 698 (E.D.Va.2000) (“[A] judge is equally obliged not to recuse himself when there is no necessity, as he is to recuse himself when there is.”); *Armstrong v. Potter (In re Potter)*, 2002 WL 31802978 n. 1 (10th Cir. BAP Oct. 8, 2002) (“A judge's duty to hear cases is not so ephemeral that it dissipates at the first sight of any potential bias or partiality toward one of the litigants.”); *In re Womack*, 253 B.R. 245, 246 (Bankr.E.D.Ark.2000) (“Although the Court has a duty to recuse where any of [the § 455] factors exist, there is a concomitant duty not to recuse on unsupported, irrational or tenuous speculation.”). As Justice (then Judge) Breyer explained in *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir.1989), courts must exercise great care in considering motions for recusal so as to discourage their use for purposes of judge shopping or delay:

When considering disqualification, the district court is *not* to use the standard of mere ... suspicion ... that is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

See also *In re Nat'l Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir.1988) (“Judges have an obligation to litigants and their colleagues not to remove themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone ... and facilitate judge-shopping.” (citation omitted)); *United States v. Pungitore*, 15

F.Supp.2d 705, 715 n. 4 (E.D.Pa.1998) (“A liberal recusal policy would encourage judge shopping.”); *Scott v. Pryor (In re Chandler's Cove Inn, Ltd.)*, 74 B.R. 772, 773 (Bankr.E.D.N.Y.1987) (“[R]ecusal motions which are too liberally granted are tantamount to unilateral ‘judge shopping’ and may be used for a delaying tactic, for their disposition requires a serious investment of judicial time and thought.”).

Generally, recusal on grounds of partiality arises in one of two circumstances: when the judge forms opinions of the litigants based on information learned outside the course of judicial proceedings (the “Extrajudicial Source Doctrine”), or when a judge whose information is limited to that revealed during the course of judicial proceedings forms a favorable or unfavorable opinion so extreme that fair judgment appears impossible (the “Pervasive-Bias Exception”). See *generally* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2922 (2d ed.1995). Discussing these concepts in its decision affirming a district court’s denial of a motion for recusal made under § 455, the Supreme Court, in *Liteky v. United States*, 510 U.S. 540, 555-56, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), explained:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S. [563], at 583, 86 S.Ct. [1698], at 1710[, 16 L.Ed.2d 778 (1966)]. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks made during the course of a trial 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. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage case against German-American defendants: “One must have a very judicial mind, indeed, not [to be] prejudiced against the German

Americans” because their “hearts are reeking with disloyalty.” *Id.*, at 28[, 41 S.Ct. 230] (internal quotation marks omitted). *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration- even a stern and short-tempered judge's ordinary efforts at courtroom administration- remain immune.

See also Barclays/American Business Credit, Inc. v. Adams (In re Adams), 31 F.3d 389, 396 (6th Cir.1994) (following *Liteky* and denying recusal motion where there was no showing that the bankruptcy judge had displayed deep-seated antagonism toward the movant or favoritism toward the opposing party).

The standard for determining whether a judge should be disqualified is an objective one: whether a reasonable person with knowledge of all facts would conclude that the judge's impartiality might reasonably be questioned. *Lopez v. Behles (In re American Ready Mix, Inc.)*, 14 F.3d 1497, 1501 (10th Cir.1994), *cert. denied*, 513 U.S. 818, 115 S.Ct. 77, 130 L.Ed.2d 31 (1994); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir.1987); *United States v. Story*, 716 F.2d 1088, 1090 (6th Cir.1983).

The proper test ... is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man.

United States v. Cowden, 545 F.2d 257, 265 (1st Cir.1976), *cert. denied*, 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1977). As the Sixth Circuit explained, “[t]he standard is an objective one; hence, the judge need not recuse himself based on the ‘subjective view of a party’ no matter how strongly that view is held.” *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir.1990) (quoting *Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir.1988), *cert. denied*, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989)). The Seventh Circuit has elaborated on the necessity and desirability of this objective recusal test:

An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system

to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will *apply* rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.

Hook v. McDade, 89 F.3d 350, 354 (7th Cir.1996) (quoting *In re Mason*, 916 F.2d 384, 386 (7th Cir.1990)).

* * * * *

There is no allegation that the Court's actions have been influenced by any information learned outside of judicial proceedings. Thus, the Extrajudicial Source Doctrine does not come into play. A litigant relying on the Pervasive Bias Exception- i.e., alleging bias on the basis of events occurring in the course of the current proceedings- must show that those events display a deep-seated and high degree of antagonism or favoritism. *Liteky*, 510 U.S. at 555, 114 S.Ct. 1147. As stated by Chief Judge Waldron of this Court:

If counsel is not satisfied with the court's ruling, a multi-tiered appellate process provides ample opportunity for counsel to continue to assert his position. A court colloquy questioning counsel's legal arguments set forth in motions and memoranda previously filed in connection with a proceeding, followed by a decision in which the court does not adopt those same legal arguments of counsel cannot provide an adequate basis for a motion for removal.

In re Dougan, No. 3-87-00180, slip op. at 7 (Bankr.S.D.Ohio Jan. 12, 1988). *Accord Sylver*, 214 B.R. at 422, 427-28. See also *Miami Employees Fed. Credit Union v. Turner (In re Turner)*, 69 B.R. 95, 96 (Bankr.S.D.Ohio1987) (Perlman, J.) (holding that statements directed to counsel during pretrial conference on dischargeability complaint are not indicative of any bias or prejudice toward a party, and likewise, statements by court suggesting that defendant file a counterclaim do not reflect bias or prejudice since defendant had stated that a violation of the stay had occurred and court has the "duty ... to see that the laws of the United States Bankruptcy Code are enforced.").

In re Haas, 292 B.R. 167, 175 – 78 (Bankr. S.D. Ohio 2003).

In the circumstances of this proceeding, there is no allegation that the Extrajudicial Source Doctrine applies. Accordingly, in order to prevail, the Movant must satisfy the objective standard that the Trial Judge's actions at the hearing display the

required “deep-seated favoritism or antagonism that would make fair judgment impossible.” See *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994).

Proceedings Prior To The Hearing

This adversary was commenced by the Movant in December 2005 and, despite repeated attempts to conclude the discovery process and determine the issues presented, the issues have not yet been determined; however, the trial in this adversary is set for March 8, 2007.

Although the Movant has alleged that the Trial Judge bears “antagonism toward her” and had “prejudged the case,” a review of the history of this case, as noted by the Defendant (Doc. 121), demonstrates the opposite. The Trial Court’s substantive and procedural rulings in this adversary have repeatedly adopted the Movant’s position.

Without detailing every specific ruling, the court previously entered an *Order Denying, Without Prejudice, Pending Motions, Authorizing Amended Complaint And Fixing Response Time* (Doc. 15). That Order (Doc. 15) provided, in part:

On February 2, 2006, the Plaintiff filed a paper titled, *Complaint Objecting To Dischargeability* (Doc. 12). This paper, although not properly titled, is clearly an Amended Complaint. This paper was not filed in compliance with the requirements of Federal Rule of Bankruptcy Procedure 7015, since it fails to contain the written consent of the adverse party and was not the result of an order following a motion seeking leave of the Court authorizing such a filing.

The Court, in the specific circumstances of this proceeding, noting that the filing (Doc. 12) could be properly stricken, also recognizes that a properly filed motion could be granted, will allow the *Amended Complaint* (Doc. 12) to stand as a filing in this case.

As a result, the pending *Motion To Dismiss Of Defendant Susan Mosley* (Doc. 5) and the *Motion For More Definite Statement* (Doc. 6) are not directed to this recently filed *Amended Complaint* (Doc. 12); and, accordingly, are **DISMISSED without prejudice to filing motions in connection with the Amended Complaint (Doc. 12)**. Further, any

answer or other responsive pleadings directed to the Amended Complaint (Doc. 12) shall be filed not later than March 6, 2006. (emphasis in original).

The Court recognizes that this ruling, although the Court deems it appropriate in these circumstances, is subject to challenge by counsel for the Defendants and, if an appropriate motion for reconsideration is filed, the Court could grant a motion to strike the *Amended Complaint* (Doc. 12) and allow for the filing of other appropriate documents. The Court cautions the parties that the result of that process may be the same order that is entered herein.

Further, the court notes specifically that future violations of the applicable National and Local Bankruptcy Rules by Mary K. Soter will result in the imposition of sanctions. (emphasis in original).

In a subsequent filing, the Trial Judge, again rejected the position of counsel for the Defendant, adopted the Movant's position and entered an *Order Denying (1) Motion To Join Ruth Slone, In Her Capacity As Chapter 7 Trustee [Bankruptcy Rule 7019] And (2) Denying Motion For Judgment On The Pleadings [Bankruptcy Rule 7012(c)]* (Doc. 31).

Further, following an initially established discovery cut-off date of October 19, 2006 (Doc. 37), the Trial Judge, subsequently, extended the discovery date to December 30, 2006 and established a trial date of January 19, 2007 (Doc. 40). Thereafter, the Trial Judge denied the attorney for the Defendant's *Motion To Dismiss* (Doc. 49) and, again over the objection of the attorney for the Defendant, adopted the Movant's position and entered an order vacating the prior trial date and rescheduling the trial until March 8, 2007 (Doc. 54).

Proceedings At The Hearing – “Prejudging”

As part of the above pretrial conference, the Defendant established the Movant had failed to comply with the Court's prior Order concerning filings and had not provided

discovery to which the Defendant was entitled and, accordingly, the Defendant sought relief from these failures by the Movant in connection with any further proceedings in this adversary. The above referenced Order (Doc. 54) rescheduling, *inter alia*, the trial date, provided, in part:

As a result of counsel for the Plaintiff's failure to comply with the prior Court Order (Doc. 40), if the Plaintiff fails to comply with the above filing requirements, the Court shall bar any testimony of any witness not listed and bar the introduction of any exhibit not listed or for which a copy has not been timely filed with the Court. (emphasis in original).

* * * * *

IV. DOCUMENTS TO BE PROVIDED AND SANCTIONS

The Court notes that counsel for the Defendant filed with the Court a *Notice Of Requested Documents* (Doc. 53) which lists the documents counsel for the Plaintiff agreed to provide to counsel for the Defendant at the depositions previously held in this adversary. Counsel for the Plaintiff shall, **not later than January 29, 2007**, file a certification that the listed documents have been delivered to counsel for the Defendant or, **by that date**, file a listing identifying every document which has not been delivered, together with a memorandum setting forth all reasons which would make an order imposing sanctions unjust, or the court shall enter an appropriate order, including, but not limited to, an assessment of costs. (emphasis in original).

Consistent with the provisions of Federal Rules of Bankruptcy Procedure governing discovery, this court's Local Rule [LBR 7026-1(a)] provides:

Cooperation and Consultation. Discovery proceedings shall be promptly commenced. All counsel and any party appearing *pro se* are required to cooperate and consult with each other in a courteous manner in all matters related to discovery and shall freely exchange discoverable information and documents upon informal written request, whether or not a pretrial conference has been scheduled or held in a proceeding. No objections, motions, applications or requests related to discovery disputes shall be filed pursuant to the provisions of Rules 7026 through 7037 unless extrajudicial means for the resolution of the discovery dispute have been exhausted. Without other compelling factors, discovery should not be delayed as a result of a dispute involving the payment or allocation of the costs of discovery. (emphasis in original).

The applicable Federal Rules of Bankruptcy Procedure governing discovery and this court's Local Rule [LBR 7026-1(a)] require compliance, unless there is a timely filing alleging a basis which would justify a failure to comply with requested discovery. Despite the Movant's agreement to provide the requested discovery and the filing by counsel for the Defendant specifying the requested discovery (Doc. 53), the Movant filed a *Certification Regarding Documents Delivered Or Not Delivered To Counsel For Defendant* (Doc. 57). Thereafter, Counsel for the Defendant filed a *Renewed Motion To Compel Production Of Documents, Response, And Objection To Certification Of Plaintiff Regarding Documents* (Doc. 58), the Movant filed a *Memorandum Of Plaintiff In Opposition To Defendant's Renewed Motion To Compel Production Of Documents, Response, And Objection To Certification Of Plaintiff Regarding Documents* (Doc. 61) and the court entered an *Order: Setting Hearing And Requiring Filings* (Doc. 60) which scheduled the Hearing for February 7, 2007.

It is significant to note that in the Defendant's *Renewed Motion To Compel Production Of Documents, Response, And Objection To Certification Of Plaintiff Regarding Documents* (Doc. 58), the opening sentence of the attached Memorandum, specifically noted that the Movant "has produced no documents in response to Defendant's request for production of all monthly statements and cancelled checks on Plaintiff's Key Bank Account from December 15, 2000 through April 30, 2004."

As part of the preparation for the Hearing, the court reviewed the documents filed by the parties in connection with the issues to be determined. Since the issues presented were legal issues capable of determination on the documents filed by the parties, the court's pre-hearing review of the documents indicated that the Movant had

not complied with the required discovery process. It should be noted that, at the Hearing, although counsel presented arguments, neither party introduced evidence through the testimony of witnesses

Notwithstanding that counsel for the Defendant decided that he would deem his outstanding discovery request satisfied as a result of the documents turned over to him by the Movant at the Hearing, it also became evident that the Movant had, at the time of the Hearing, possession of documents, included in the discovery request by counsel for the Defendant, which had not been provided to the Defendant and to which the Defendant was entitled.

As correctly noted by in the Defendant's response (Doc. 121):

In October 2006 undersigned counsel sent a letter to opposing counsel requesting, inter alia, production of all bank statements, check registers, and cancelled checks on any account on which Plaintiff was the signor, for the period of time in question in this litigation. In response thereto, Plaintiff produced Fifth Third Bank statements at her deposition. Further, at her deposition, Plaintiff testified that her 2003 and 2004 Key Bank statements were in her possession. Yet, as of the hearing on the discovery issue, Plaintiff had not produced those bank statements. The fact that Plaintiff testified that she had possession of those bank statements and that they had not been produced was clearly made known in the discovery dispute pleadings preceding the hearing. At the hearing, it was only after that fact was again brought up by undersigned counsel (page 6 of the transcript) that the exact documents that had been requested in October and admitted to be in Plaintiff's possession in early November were actually produced in open court. Plaintiff produced no evidence that those documents had been previously provided.

Simply put, Plaintiff's counsel had a duty to provide the documents that were requested in October and to make diligent inquiry to ensure that the discovery requests was correctly responded to.

The Defendant's discovery requests, as sought pursuant to documents filed by the Defendant prior to the Hearing, were included in the scope of issues to be considered and determined at the Hearing [See *Exhibit List Of Defendant Tommy M.*

Mosley For February 7, 2007 (Doc. 69, Exhibit A – *October 26, 2006 Discovery Request letter*, etc.)). The Movant’s eventual compliance with the Defendant’s discovery request was consistent with the Trial Judge’s observation that “this [hearing concerning counsel for the Defendant’s request for discovery] is not going to go very well for you [the Movant] today.”

The above statement of the Trial Judge was not a matter of “prejudging”; rather, this initial observation was a matter of appropriately recognizing, based on the parties’ pre-filing documents, that counsel for the Movant had not complied with counsel for the Defendant’s discovery request.

The Movant’s argument concerning “prejudgment” does not provide a basis to grant the Movant’s motion (Doc. 118).

Proceedings At The Hearing – “False Accusations”

The Movant alleges that the Trial Judge’s statement, “*I think it has been a problem every time you have come before me,*” is a “false accusation,” demonstrating “an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute[.]” It appears that the Movant’s understanding of the Trial Judge’s statement, “*I think it [the failure of the Movant to comply with a discovery request] has been a problem every time you have come before me,*” is not limited to the actual words, but includes additional language, included here as underscored text, as follows: “*I think it [the failure of the Movant to comply with a discovery request] has been a problem every time you have come not just in connection with the pending adversary, but in connection with every appearance by you in every proceeding in which you have appeared before me.*”

As previously noted, the Trial Judge's statement was made at the Hearing and in the context of the pending adversary. Nothing in the words "*I think it [the failure of the Movant to comply with a discovery request] has been a problem every time you have come before me*" indicates the statement extended to any circumstances, other than the circumstances of the pending adversary.

Despite counsel for the Plaintiff's mistaken belief that the Trial Judge must have been referring to every time she had ever appeared before the court in her entire history, the Trial Judge's statement only occurred on the specific day of The Hearing in the context of the parties' discovery disputes and was limited to the parties' discovery disputes in the pending adversary. In the context of the parties' discovery disputes, the court's statement remains correct that "*[i]t [the failure of the Movant to comply with the Defendant's discovery request] has been a problem every time [the Movant] you have come before [the court in the pending adversary with regard to discovery issues].*"

Additionally, even if the Trial Judge's statements were to be viewed from the mistaken perspective of the Movant, they fail to provide a basis to grant the relief requested by the Movant. As the Supreme Court held:

Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. (emphasis in original).

Liteky, 510 U.S. at 555-56, 114 S.Ct. at 1157.

Although the court regrets that the Movant, or anyone who appears before the court, has a perception, no matter how erroneous, that this court has some bias or prejudice with regard to them or the issues involved in their proceeding, the clear intent of 28 U.S.C. § 455, and the binding case law that has developed under this section, is

to require the court to determine whether such motions may appropriately be granted.

In the overall context of this adversary, and the specific context of the Hearing, the Movant has not satisfied the objective standard that the Trial Judge's actions display the required "high degree of favoritism or antagonism as to make fair judgment impossible." See *Hass*, 292 B.R. at 179, *quoting Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157.

Conclusion

Accordingly, the Plaintiff's *Motion For Disqualification Of The Hon. Thomas F. Waldron* (Doc. 118) is **DENIED**. An order in accordance with this decision is simultaneously entered.

c:

Mary K. C. Soter, Esq., 5518 North Main Street, Dayton, Ohio 45415-3455 (Atty. for the Plaintiff)

Arthur R. Hollencamp, Esq., 2107 First National Plaza, 130 West Second Street, Dayton, Ohio 45402 (Atty. for the Debtors/Defendant)

John Paul Rieser, Esq., 1520 First National Plaza, 130 West Second Street, Dayton, Ohio 45402 (Chapter 7 Trustee)

###