United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Richard Alvin Bennett and Pamela Marie Bennett**
Case Number: **00-11235**
Chapter : **12**
Judge Code: **SR**
First Meeting Location: **Roswell**
Reference Number: **12 - 00-11235 - SR**

Document Information

Number: 162

Description: Memorandum Opinion re: [94-1] Motion to Disqualify the Honorable James S. Starzynski from presiding over the proceedings in the entire case by Pamela Marie Bennett, Richard Alvin Bennett .

Size: 27 pages (48k)

Date Received: 06/22/2001 02:42:24 PM	**Date Filed:** 06/22/2001	**Date Entered On Docket:** 06/25/2001

Court Digital Signature View History

5b d5 06 54 c4 27 d5 06 de d6 3d 81 f9 fb a2 54 ed 17 7b 0b 0a 4d 90 88 6a 31 5d 45 ea c6 c4 9b f7 7a 5b 65 9f b8 cb 13 ce c4 e0 f6 21 c6 2e 93 ec 5b 04 e4 1b 3f 67 7c 38 28 92 59 8d 0e 7c 6b 42 e8 20 59 14 a2 72 66 c9 38 9d db 69 82 1e fa a6 29 97 6b 5a ee 5d 78 04 95 b4 85 04 1d 63 50 9b b9 f3 d3 52 a1 28 89 6e ef d1 51 58 98 19 b0 07 a4 0f b3 47 b3 d8 2a e8 88 e5 3d 8e 25 0a 16

Filer Information

Submitted By:

Comments: Memorandum Opinion on Debtors' Motion for Disqualification of Bankruptcy Judge and Motion Pursuant to 28 U.S.C. Section 455

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
RICHARD ALVIN BENNETT and
PAMELA MARIE BENNETT,
Debtors. No. 12-00-11235 SR

MEMORANDUM OPINION ON DEBTORS' MOTION FOR DISQUALIFICATION OF BANKRUPTCY JUDGE and MOTION PURSUANT TO 28 U.S.C. SECTION 455

This matter is before the Court on the Motion Pursuant to 28 U.S.C. § 455 and F.B.R. 5504(a)[sic] ("§455 Motion") and Motion for Disqualification of Bankruptcy Judge ("Disqualification Motion")(collectively, "the Motions") filed by debtors. Debtors are represented by their attorney J.D. Behles & Associates, a Commercial Law Firm, P.C. (Jennie Deden Behles). The United States Trustee appeared through its attorney Ron Andazola. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

The materials before the Court are the §455 Motion (doc. 65), Disqualification Motion (doc. 94), Debtors' Procedural Memorandum in Regard to Disqualification (doc. 137), United States Trustees Memorandum Concerning Procedures for Disposition of Motion for Disqualification (doc. 138), Debtors' Affidavit Statements of Documentary Evidence Pursuant to Paragraph 1 of the Scheduling Order Entered by This Court (doc. 139), Affidavit of Debtors (doc. 140), Errata Notice

(doc. 141)(containing notarized signature pages of Debtors' Affidavit), United States Trustee's Response to Procedural Memorandum in Regard to Disqualification (doc. 142), and Order that the Court will Disregard the Memorandum Portion of the February 26, 2001 Submittal by the United States Trustee (doc. 157).

DISCUSSION

Debtors and their counsel raise three distinct arguments for recusal and disqualification. The first ground relates to Ms. Behles' firm's attorney fees. The second ground relates to an Order to Show Cause that the Court entered sua sponte when the Debtors failed to comply with rules regarding confirmation of their Chapter 12 plan. The third ground relates to leftover litigation still pending from a time before the Judge came on the bench involving the Judge and Ms. Behles' former law firm. Before discussing each ground, the Court will discuss the law on disqualification of a judge.

RECUSAL

Title 28 U.S.C. § 455(a)[1] provides:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in

[1] 28 U.S.C. § 144, a similar statute, does not apply to Bankruptcy Judges. See Williams v. Southwestern Gold, Inc. (In re Williams),99 B.R. 70, 71 n.1 (Bankr. D. N.M. 1989).

> which his impartiality might reasonably be questioned.

Under this statute, a judge has a continuing duty to recuse before, during, or, in some circumstances, after a proceeding if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality. United States v. Cooley, 1 F.3d 985, 992 (10th Cir. 1993). The judge's actual state of mind or lack of partiality is not the issue. Id. at 993. The test in the Tenth Circuit is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." Id. (citing United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992)).

> [T]he hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system. Judges, accustomed to the process of dispassionate decision making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would. On the other hand, a reasonable outside observer is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased. There is always some risk of bias; to constitute grounds for disqualification, the probability that a judge will decide a case on a basis other than the merits must be more than "trivial."

United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998)(citing In re Mason, 916 F.2d 384, 386 (7th Cir. 1990)).

> The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge's impartiality into question.

Cooley, 1 F.3d at 993. (Emphasis in original.) Section 455(a) must not be construed to require recusal on the "merest unsubstantiated suggestion" of bias or prejudice. Id. "The statute is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." Id. Finally, there is as much of an obligation for a judge not to recuse when there is no ground to do so as there is for the judge to do so when there are grounds. Id. at 994.

Section 455(a) is silent as to procedures that the Court should follow. "A reading of case law shows that Motions for Disqualification are typically decided on the documents submitted to the court." Lieb v. Tillman (In re Lieb), 112 B.R. 830, 836 (Bankr. W.D. Tx. 1990). Factual allegations in the pleadings do not have to be taken as true. Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987)(per curiam). "Nor is the judge limited to those facts presented by the challenging party." Id.

Debtors argue that the Motions should be referred to another judge for decision. Debtors cite two cases from the

Fifth Circuit that support this proposition. In those cases the procedure was: 1) the challenged judge considered whether the claim asserted rose to a threshold of raising a doubt in the mind of a reasonable observer, and if so, 2) another judge decided the facts. Levitt v. University of Texas, 847 F.2d 221, 226 (5th Cir.) cert. denied, 488 U.S. 984 (1988)("The judge can himself decide whether the claim asserted is within § 455. If he decides that it is, then a disinterested judge must decide what the facts are.") and Lieb, 112 B.R. at 836 (citing Levitt.)

The majority of cases do not follow the 5th Circuit's Levitt approach, however. Matter of Extradition of Demjanjuk, 584 F.Supp. 1321, 1323 n. 1 (N.D. Ohio 1984):

> Without an understanding of the checks and balances that operate to insure a just determination of a recusal motion, one might question the efficacy of a procedure whereby the judge who is the subject of such a motion is left to rule on its sufficiency. Most courts have not been squarely faced with a challenge to the procedure. However, at least one court has seen fit to comment extensively on the reasons behind it. The court in United States v. Zagari, 419 F.Supp. 494, 498-99 (N.D. Cal. 1976), expressing its support for the current manner of disposing of recusal motions, remarked as follows:
>
> > Some of the reasons that have been given for the rule allowing the judge being questioned to pass on the legality of the motion are that otherwise the disqualification procedure could be used as a tool for delay and disruption of the administration of the courts, and that such judge knows better than anyone else whether

> he could give the parties a fair and impartial trial.
>
> Although courts have been known to seek reassignment of a matter to another judge for purposes of resolving recusal motions, see United States v. Zagari, 419 F. Supp. at 497, such action is by no means typical or required to insure a just ruling on such motions. See United States v. Olander, 584 F.2d 876, 883 (10th [sic, should be 9th] Cir. 1978), vacated on other grounds, 443 U.S. 914, 99 S.Ct. 3105, 61 L.Ed.2d 878 (1979). Confident that it can and will reach a just determination without endangering the Court's appearance of impartiality, this Court will follow the practice recognized by most of the federal courts that have been faced with recusal motions. That parties may seek appellate review of this Court's ruling on the question of recusal doubly insures a just determination of the issue raised in Respondent's Motion. See, e.g., City of Cleveland v. Krupansky, 619 F.2d 576 (6th Cir. 1980), cert. denied, 449 U.S. 834, 101 S.Ct. 106, 66 L.Ed.2d 40 (1980); Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966); United States v. Zagari, 419 F.Supp. 494.

Nor does the Tenth Circuit follow the 5th Circuit rule. See, e.g., David v. City and County of Denver, 101 F.3d 1344, 1351 (10th Cir. 1997)(Trial court decided § 455(a) motion; affirmed.); Hinman v. Rogers, 831 F.2d at 940 (Trial court decided § 455 motion; writ of mandamus denied.); Franks v. Nimmo, 796 F.2d 1230, 1235 (10th Cir. 1986)(Trial court decided § 455(a) motion; affirmed.) Finally, the language of 28 U.S.C. § 455(a) itself suggests that the decision is to be made by the challenged judge. The use of the term "shall disqualify himself" necessarily means that the decision is to be made by the challenged judge.

Based on the above, the Court finds that it should review the Motions rather than transfer them to another judge. The Court also finds that it is proper procedure to decide the Motions based on the existing record. For the reasons set forth below, the Motions will be denied.

ATTORNEY FEES ORDER

The only issue raised in the § 455 Motion is that the Court, sua sponte, reduced the billing rates for debtors' counsel in the employment order (doc. 52). That order reduced the hourly billing rates requested from $225 for Ms. Behles to $200, and $165 for Sally Hagan to $150. The Order also states: "The firm is authorized to request higher fees by separate motion." According to the § 455 motion, this conduct demonstrates a "predisposition toward reducing hourly rates to the range charged by the Judge prior to his elevation to the bench, this would be significant and warrant recusal under what is sometimes the Extra Judicial [sic] Source Doctrine." The issue of fees also appears in the Disqualification Motion. See ¶¶ 13, 15, 16. The Court finds that the Order reducing rates does not rise to the level of being a disqualifying event. First, one cannot infer prejudice to a client from actions taken against the attorney in the case. In re Shuma, 124 B.R. 446, 449-50 (Bankr. W.D.

Pa. 1990)(The protections of § 455 extends only to parties. "Prejudice toward counsel is not ordinarily imputed to the party and is not generally sufficient grounds for disqualification of a judge.") This is especially true if counsel's basis for recusal relates to fees:

> [N]o objectively reasonable litigant could believe that a bankruptcy judge who follows consistent authority to rely on experience in fee hearings should therefore have his impartiality reasonably questioned. We who serve on the Bankruptcy Court in this District are entitled to rely in part on our judicial and non-judicial experience in considering fee applications, and all do so to some degree. Further, we have a duty to inquire into fees even when no objections are raised as noted at the outset of this opinion. No objective litigant could reasonably conclude that these practices give rise to questions about impartiality.

In re Wyslak, 94 B.R. 540, 545 (Bankr. N.D. Il. 1988). Second, the Order specifically authorizes further motions if the attorney wants to bill the estate at a higher rate, and that the $200 and $150 were rates approved in the interim. Finally, as discussed below, the fee order is not a proper basis for the Motions. First, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994). Second, the fee orders were perfectly reasonable in context of the Bankruptcy Code and Rules.

Bankruptcy Code section 330(a)(4)(B) provides the statutory basis for compensating a debtor's attorney in Chapter 12:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B). "Reasonableness" is discussed in section 330(a)(3):

> In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including —
>
> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
> (E) whether the compensation is reasonable, based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3). Finally,

> The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award

> compensation that is less than the amount of compensation that is requested.

11 U.S.C. § 330(a)(2).

The Bankruptcy Court has the power and duty to review fee applications even in the absence of objections. In re Busy Beaver Building Centers, Inc., 19 F.3d 833, 843 n. 8 (3rd Cir. 1994)(citing "legions" of cases)[2].

> Implicit in the Court approving only a "reasonable" amount of compensation is that the bankruptcy court in its discretion, decides on the award under 11 U.S.C. § 330. ... The court has the power to limit an award of compensation or reimbursement even in the absence of an objection to the application. The permissive language of section 330 – "the court may award" – implies that the award of compensation or reimbursement is within the court's discretion, to the extent the court complies with the limitations of section 330(a). Section 105 empowers the court sua sponte to take any action or make any determination necessary or appropriate to enforce or implement orders or rules. Under Rule 2017(b), the court may determine, on its own initiative and in the absence of any motion of a party in interest, whether any payment by the debtor to an attorney for services is excessive. The court, therefore, even in the absence of an objection to the application, has both the power and the duty to determine the proper amount of compensation based on the limitations specified by the Code.

---

[2] The Court of Appeals for the Tenth Circuit has not specifically ruled on the bankruptcy court's duty in the situation where no creditor objects to fees. However, in an unpublished opinion the Tenth Circuit approved of a bankruptcy court's sua sponte reduction of attorney fees, citing In re Busy Beaver Building Centers. See Valley National Bank v. BTS, Inc. (In re BTS Inc.), 166 F.3d 346, 1998 WL 788829, 4 n.4 (10th Cir. 1998)(unpublished.)

Robert J. Landry, III and James R. Higdon, Ethical Considerations in Appointment and Compensation of an Attorney for a Chapter 11 Debtor-in-Possession, 66 Miss. L.J. 355, 372-73 (1996). (Footnotes omitted.) See also Federal Bankruptcy Rule 2017(b):

> On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

In reviewing employment applications and fee applications it is entirely appropriate for a bankruptcy judge to rely on his or her legal experiences. In re Wysla, 94 B.R. 540, 544 (Bankr. N.D. Il. 1988)(Collecting cases.) Employment and fee applications filed by other professionals in the subject case and other cases are also relevant. Smith v. Freeman, 921 F.2d 1120, 1122 (10th Cir. 1990)(Civil rights action; court should consider customary practice in the locale and may use own knowledge to supplement evidence of reasonable fees.) The goal of the fee structure in bankruptcy is to make bankruptcy practice as attractive (i.e. lucrative) as other legal fields

to ensure a supply of competent specialists. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 329-30 (1977):

> The compensation is to be ... based on the time, the nature, the extent, and the value of the services rendered, and on the cost of comparable services other than in a case under the bankruptcy code. ... [If there were an arbitrary limit on fees] [b]ankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service.

(Reprinted in App. C, Lawrence King, Collier on Bankruptcy, App. Pt. 4(d)(i) at 4-1459.) History and experience are necessary for the bankruptcy judge to gauge the market to meet this goal. Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. The Celotex Corporation (In re The Celotex Corporation), 232 B.R. 484, 487 (M.D. Fl. 1998)("[T]he Bankruptcy Court ... correctly relied on the 'legal market' and then properly assumed the role of acting as a surrogate for the estate, reviewing the fee application much as a sophisticated non-bankruptcy client would review a legal bill.")(Citation and internal punctuation omitted.) See also Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enterprises, Inc.), 997 F.2d 1321, 1323 (10th Cir. 1993) (Acknowledging that Johnson v. Georgia Highway Express, Inc. provides the proper analysis for reasonableness of counsel's

fees in a bankruptcy case.) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974):

> [W]e must remand to the District Court for reconsideration [of attorney fees] in light of the following guidelines:
> ...
> (3) *The skill requisite to perform the legal service properly.* The trial judge should closely observe the attorney's work product, his preparation, and general ability before the court. The trial judge's expertise gained from past experience as a lawyer and his observation from the bench of lawyers at work become highly important in this consideration.
> ...
> (5) *The customary fee.* The customary fee for similar work in the community should be considered....
> ...
> (12) *Awards in similar cases.* The reasonableness of a fee may also be considered in the light of awards made in similar litigation within and without the court's circuit....

Debtors and their attorney question this Court's procedure for employment of professionals partially because the Court prefers to resolve the issue of appropriate legal rates at the outset of the case rather than at the end. See Affidavit Statements of Documentary Evidence (doc. 139) ¶ 15 ("It has never been the practice in this jurisdiction to set hourly rates at the time of employment.") Even if this were true, that does not make this Court's procedure improper. This Court has adopted this policy for several reasons. First, it allows all parties to file objections to the rates

before the work is done, giving the professional's attorney a choice in whether to undertake the representation. Second, it eliminates fighting over rates at the end of the case; once an order is entered approving a rate, that is the presumptive rate and will be changed only in rare circumstances. See §328(a). Third, once a rate is established it is easier to do cost/benefit analyses of any issues that arise during the case. Since coming on the bench, this Judge has followed this procedure in every case; Ms. Behles and her cases have not been singled out for reviewing rates at the outset of the case.

In conclusion, although Ms. Behles may feel put upon because the Court is not giving her carte blanche to charge whatever fees she chooses in this relatively straightforward Chapter 12 case, the Court's denial of blanket approval of her requested rates does not demonstrate a prejudice directed towards her clients such that this Judge should recuse.

CHAPTER 12 CONFIRMATION & ORDER TO SHOW CAUSE

Chapter 12 is supposed to be an expedient, streamlined process. Zerr v. Montezuma Credit Union (In re Zerr), 167 B.R. 953, 960 (Bankr. D. Ks. 1994). Chapter 12 was designed to provide quick relief to both debtors and creditors. In re

Kennedy, 181 B.R. 418, 420 (Bankr. D. Ne. 1995). Debtors must file their plan promptly. Title 11 Section 1221 provides:

> The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

This short fuse in section 1221 was not enacted to benefit the debtor, as the Debtors argue. See 8 Collier on Bankruptcy ¶1221.01[2] at 1221-3:

> Although the legislative history accompanying the original enactment of chapter 12 is not clear on the point, the 90-day limitation was probably included in chapter 12 for the benefit of creditors rather than for the benefit of the debtor. Because chapter 12 lacks the safeguards for creditors that are provided in chapter 11, the 90 day limitation, together with the 45 day limitation of section 1224, is the primary protection for creditors against a debtor's languishing in chapter 12 without confirming a plan. Thus, it is appropriate that the debtor should be required to meet a stringent burden if the debtor seeks an extension of the 90 day period. The court should allow an extension only if the debtor clearly demonstrates that the debtor's inability to file a plan is due to circumstances that are beyond the debtor's control.

Confirmation must be completed within 45 days of the filing of the plan:

> After expedited notice, the court shall hold a hearing on confirmation of the plan. A party in interest, the trustee, or the United States trustee may object to the confirmation of the plan. Except for cause, the hearing shall be concluded not later than 45 days after the filing of the plan.

11 U.S.C. § 1224. Therefore, under these code sections the confirmation process must be concluded by, at the latest, the 135th day of a Chapter 12 case. The legislative history makes it clear that the primary purpose of creating the "for cause" extension in section 1224 was for the benefit of the court. 8 King, Collier on Bankruptcy, ¶1224.01[3] at 1224-3.

> The Conferees are aware that this imposes a burden on the bankruptcy courts. Therefore, an exception for cause is provided. While a backlog of cases is sufficient cause for an extension of the forty-five day requirement, the conferees expect this exception to be used sparingly in order to facilitate the proper operation of Chapter 12 – which proper operation depends on prompt action.

H.R. Rep. No. 99-958, 99th Cong., 2d sess. 51 (1986). See also In re Novak, 103 B.R. 403, 412 (Bankr. E.D. N.Y. 1989) ("[N]umerous bankruptcy courts have held that debtors forfeited their ability to proceed under Chapter 12 by failing to respect the statutory deadlines.")(citing cases); In re Lubbers, 73 B.R. 440, 442 (Bankr. D. Ks. 1987)(Court dismisses Chapter 12 case because amended plan was filed on day 134 so that there was insufficient time for creditors to review the plan and formulate objections by day 135; filing amended plan on day 134 was unreasonable delay prejudicial to creditors.); In re Ryan, 69 B.R. 598, 599 (Bankr. M.D. Fl. 1987):

> Debtors seek an extension of time in order to work out problems with certain creditors and to file a second amended plan if necessary. This reason is

> insufficient to establish "cause" for an extension of the forty-five (45) day requirement of § 1224. If continued, the Court could not conclude the confirmation process within forty-five (45) days. Accordingly, debtors' motion for continuance is denied.

These cases all indicate that Chapter 12 is a very unforgiving undertaking for debtors. Deadlines are strictly enforced; failures to meet deadlines are dealt with harshly. The granting of extensions or continuances, even if disguised as last minute amended plans, should be the exception. Debtors, and certainly their counsel, are deemed to be aware of this situation when they file a Chapter 12 case. See also In re Land, 82 B.R. 572, 576 (Bankr. D. Co. 1988)(Court issued Order to Show Cause when court perceived that plan was not filed timely.)

Bankruptcy Rule 2002(a)(8) also fits into the scheduling of a Chapter 12 case. That rule provides:

> [T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:
> ...
> (8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

Our Local Rule goes one step further:

> The debtor in a chapter 12 case shall, within 5 days of filing the plan, call the judge's chambers and obtain a confirmation hearing and prepare, serve and file timely notice of the hearing.

NM LBR 2082-1.

The docket sheet in this case shows that the Chapter 12 case was filed on March 7, 2000. On June 5, 2000 Debtors filed a motion to extend time to file a plan to June 12, 2000 (doc. 55), and the Debtors in fact filed their plan on June 12, 2000 (doc. 62). Sometime on or about June[3] 14, 2000 this Judge's staff gave Ms. Behles a confirmation setting of July 19, 2000 at 9:00 a.m. At this point it was debtors' responsibility to "prepare, serve and file timely notice of the hearing." NM LBR 2082-1. Without dwelling on what "timely" means, the outside limit for serving notice of the hearing on the creditors would be at least twenty days before the hearing. Bankruptcy Rule 2002(a)(8). As of July 11, 2000, no certificate of service of the notice was on the docket, and the Court issued an Order to Show Cause Why Case Should Not be Dismissed for failure to comply with LBR 2082-1 and Bankruptcy Code Section 1224 (doc. 72).

The debtors and their attorney responded (doc. 79). Ms. Behles' first response (¶1) is that she was not given a date for confirmation; however, she does acknowledge that the Court made a "suggestion" of the date for confirmation to her

[3] The Order to Show Cause issued in this case (doc. 72) erroneously states July 14, 2000.

paralegal (¶3). This argument fails because Ms. Behles had a duty under the local rule to obtain a setting within 5 days; if the "suggestion" of a date to the paralegal was insufficient, she should have called the Deputy Clerk herself. Paragraph 1 of the response also states:

> [N]or was any Order ever entered as has been the custom of this Court to enter an Order fixing a date for confirmation hearing, fixing a date on which objections must be filed at a date prior to the confirmation hearing, all of which complies with the Bankruptcy Code and Rules.

Perhaps Ms. Behles is confused. In Chapter 11 cases a standard order is entered approving the disclosure statement and directing that notice be sent, fixing deadlines, and setting a confirmation hearing. See Official Form 13. The Bankruptcy Court for the District of New Mexico has never entered a similar type order in chapter 12 cases, nor is there an Official Form for this purpose. The duties[4] for debtor's counsel are clearly set out in Bankruptcy Rule 2002(a)(8) and NM LBR 2082-1. See also Form NM-76A (Local form giving notice

[4] The Clerk's Practice and Procedure Guide ("Guide"), while having no precedential or legal effect, does describe accepted procedures for the District. Guide § 8.5.1 anticipates that Counsel call the courtroom deputy for a date and time of hearing. Guide § 8.5.2 states "Because time is of the essence in the confirmation process, debtor's counsel should be prepared to mail notice of the hearing as soon as a hearing date is obtained from the courtroom deputy." There is no reference to an Order fixing deadlines or directing that notice be given.

of hearing on Chapter 12 confirmation states that objections to confirmation must be filed "within 20 days of the date of mailing of this notice", not by a date fixed by the Court.) In sum, it is clear to the Court that the Debtors' attorneys were negligent in not following the proper procedures to ensure timely confirmation of the case.

The second response to the Order to Show Cause seems to focus on the requested one week extension to file the Chapter 12 plan:

> Furthermore, Debtors' counsel following the hearing on the Motion to Extend and the granting of the Order to extend the time and the statement to the Court that an Amended Plan had been filed and the Amended Plan, by law, now becomes the Plan as modified, which will then require a notice, pointed out in response to the question of the Court that a timely motion for extension would be filed to deal with the fact that a Motion for Extension of time to File the Plan had been filed on or before June 5, 2000 and was not heard until July 10, 2000; and that it would be necessary to deal with an extension of time to confirm the Plan.

Response to Order to Show Cause (doc. 79) ¶4. Therefore, according to the debtors "It is improper to give notice of a Plan which may not properly be filed until such time as the Court has entered an Order determining that the Plan is properly filed." Id. ¶3 [sic., should read ¶5.] Debtors cite no legal authority in support of this proposition, which seems to directly contradict the plain language of NM LBR 2082-1

requiring timely notice of the filing of the plan, whether late or not.

The third response to the Order to Show Cause was that the Debtors had filed an amended plan and therefore "It would have been a waste of time and money to send out notice on a plan, then send out notice on a modified plan." Id. ¶3 [sic., should read ¶5]. The docket in this case shows that the "First Amended" chapter 12 plan was filed on July 10th, 2000[5].

[5] On July 19, 2000 at the time set for the original confirmation hearing, the Court gave a setting for confirmation of the First Amended Plan of August 22, 2000 at 1:30. This August 22 date is well beyond the maximum 135 days allowed by Title 11. (This is hardly indicative of prejudice by the Court against the Debtors.) Although not directly relevant to the Motions to Recuse and Disqualify, the Court further notes that the notice of this August 22 setting (doc. 82) was misleading and defective. First, the notice falsely states "The Court has authorized Debtors' counsel to fix August 14, 2000 by which objections to confirmation must be filed in the office of this clerk..." This Court authorized nothing; the Court simply fixed the date of confirmation and the rules required debtors' counsel to give proper notice. In fact, at the July 19th hearing the Court specifically denied a request by Ms. Behles to fix a deadline. As noted above, Bankruptcy Rule 2002(a)(8) requires at least 20 days notice of the time for filing objections and the hearing on confirmation of a chapter 12 plan. The face of the notice shows that it was mailed to creditors on July 28, 2000, and therefore only gave 17 days notice. The document also refers to an attached mailing matrix, but none was attached. Therefore, the Court could not determine to whom the defective notice was sent. (The Court also notes that the notice on the "Third Amended" plan (doc. 111) is defective as well, in that it was mailed September 21, 2000 and required objections to be filed by the "___ day of September, 2000". This third notice also refers to a mailing list attached to the original of the notice, but no matrix is attached.)

Confirmation of the original plan was set for July 19th. This Court thinks it is highly improper for an attorney to intentionally ignore Court rules and abuse the Court's calendar because she unilaterally decides it is a waste of time to comply. Furthermore, this behavior indicates that Ms. Behles erroneously believes that she can evade the fast track chapter 12 process and indefinitely extend the deadlines of Chapter 12 simply by filing amended plans.

The next response to the Order to Show Cause was that the Court had failed to rule on collateralization issues, so it was difficult to proceed to confirmation. This response ignores the fact that collateralization is one of the major issues faced in any confirmation hearing. See 11 U.S.C. § 1225(a)(5) (Setting out required treatment of secured claims.) The Court has reviewed the original, "First Amended", "Second Amended", and "Third Amended" plans in this case; they are substantially the same plan. The only substantive differences between them is the value of the collateral on two secured claims. Surely the original plan could simply have said that the secured claims would be paid in an amount to be determined by the Court at the confirmation hearing or by a stipulation of the parties and to be set out in the order of confirmation. Or, the plan could have set out alternative treatments depending on the

Court's collateralization findings at confirmation. Either of these treatments would have allowed the filing of a plan in a timely fashion and would have allowed confirmation within the 135 days.

Debtors' final response to the Order to Show Cause was that the Order to Show Cause should not have been raised sua sponte by the Court. See Response to Order to Show Cause (doc. 79) ¶4 [sic., should read ¶6]. This argument ignores 11 U.S.C. § 105(a):

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Therefore, it is entirely appropriate to raise dismissal sua sponte. Related to this argument are Ms. Behles' allegations in the Affidavit Statements of Documentary Evidence (doc. 139) ¶30:

> It is to be noted, that other cases in this jurisdiction tried before Judge Starzynski have also been situated such that confirmation of the plan has exceeded forty-five (45) days from the date of the filing of the plan without this court undertaking any kind of *sua sponte* show cause or dismissal. For instance, In re Fry, 12-99-16379 SS, wherein the plan was filed on February 14. confirmation hearing was not even set until April 25th without any motions

> having been filed to extend the time periods for cause or otherwise.

A simple review of the ACE on-line Fry docket sheet alone shows that this statement is simply false. The Fry chapter 12 plan was filed on February 14, 2000 (doc. 20). A notice pursuant to the rules was timely filed on February 18, 2000 setting the confirmation hearing for March 28, 2000, within the 45 days. The Court held a hearing on March 28, 2000 and granted a motion to value (i.e., it dealt with the collateralization issues). See Clerk's minutes (doc. 45). At that hearing the parties also settled a motion to borrow (which would have resolved cash collateral issues). Id. At all parties' request and based upon representations that the remaining issues were to be settled by mediation the Court entered an order continuing the confirmation hearing to April 25, 2000 (doc. 44). A settlement was then read into the record on April 25, 2000 (doc. 63) confirming the plan. Ms. Behles' statements that the "confirmation hearing was not even set until April 25th without any motions having been filed to extend the time periods for cause or otherwise" are, at best, made with a reckless disregard to the truth.

In summary, upon review, the Court feels that it was entirely justified in issuing the Order to Show Cause based on the state of the record in this case. A reasonable person,

knowing all facts, would not construe the issuance of the order as demonstrating any prejudice toward the Debtors. As a followup, the Court notified the parties by letter dated August 18, 2000 (and faxed to Ms. Behles at 11:41 a.m.[6]), that it was setting aside the Order to Show Cause in order to give the debtors the benefit of Chapter 12, in part because no creditors had supported the dismissal and in part because the Court preferred to decide issues on the merits.

PENDING LITIGATION

The Motions and supporting documents repeatedly refer to litigation that was pending in the In re K.D. Company, Inc. case. For example,

> Debtors have been made aware that Judge Starzynski has a certain antipathy or anamosity [sic] toward our attorney which may have derived from professional dealings that occurred before he became a Judge, as was exhibited in the case called In re K.D. Co. in an adversary proceeding brought by Martin Raft in which Judge Starzynski asserted a claim against Behles' law firm and others until the morning of the trial.

Disqualification Motion, ¶ 14. See also Id. ¶¶ 17, 18, and Affidavit Statements of Documentary Evidence ¶¶ 1-10, 36, 38 and 39. It is true that the Judge served as attorney for a

---

[6] Therefore, the Order to Show Cause was resolved by the time the Debtors filed their Disqualification motion on August 18 at 3:53 p.m. This leads this Court to believe that the real motivation behind the Motions is Ms. Behles' desire to have someone other than this Judge review her fee applications.

debtor before taking the bench, and that certain legal matters were unresolved in that case until after the Judge took the bench, particularly a claim against Ms. Behles for a return of attorney fees to the estate. It is also true that the Judge was in a position adverse to Ms. Behles in that case. However, the Judge disclaimed any interest in any recovery that would be awarded against Ms. Behles. See Disclaimer By Creditor James S. Starzynski, P.A. in In re K.D. Company, Inc., No. 7-96-12974 MA (Feb. 1, 2000 Bankr. D. N.M.)(doc. 544). This disclaimer was filed before this Chapter 12 proceeding was even filed. Nowhere in the record is there any indication that anything in the K.D. Company, Inc. case has or had anything to do with the Bennetts. Compare Mitchael v. Intracorp, Inc., 179 F.3d 847, 860-61 (10th Cir. 1999)(Judge not recused due to his prior representation of defendants in unrelated matters.) Ms. Behles, in raising this as an issue in this Chapter 12 case, is simply trying to confuse the record with irrelevant material. Therefore, the Court finds that this claim for recusal is groundless and should be denied.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on June 22, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

Jennie D. Behles
PO Box 849
Albuquerque, NM 87103

Joe Parker
PO Box 410
Clovis, NM 88102-410

Ronald Andazola
Assistant U.S. Trustee
PO Box 608
Albuquerque, NM 87103-608

Manuel Lucero
Assistant U.S. Attorney
PO Box 607
Albuquerque, NM 87103

Ronald E. Holmes
4300 Carlisle Blvd. NE Suite 4
Albuquerque, NM 87107-4827