Dated: May 21, 2020
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
WILLIAM H. THOMAS, JR., Case No. 16-27850-L
Debtor. Chapter 11

ORDER DENYING "MOTION TO DISQUALIFY JUDGE JENNIE D. LATTA"

BEFORE THE COURT is the "Motion to Disqualify Judge Jennie D. Latta" filed by the Debtor, William H. Thomas, Jr., on March 31, 2020. [Dkt. No. 939.] The motion requests that the undersigned bankruptcy judge be "disqualified" pursuant to 28 U.S.C. § 455(a). At the request of the Debtor, the motion was scheduled for oral argument on May 21, 2020. Objections to the motion were filed by (1) Clear Channel Outdoor, Inc. ("Clear Channel"), which was joined by Michael E. Collins, Trustee ("Trustee"); Tennison Brothers, Inc. ("Tennison Brothers"); Tennessee Department of Transportation ("TDOT"); and (2) Lynn Schadt Thomas ("Ms. Thomas"). The day before the scheduled hearing, the Debtor filed a motion to continue the hearing on the motion, which was opposed by TDOT and Clear Channel. The motion for continuance was

denied. After hearing the arguments of the Debtor, Clear Channel, the Trustee, Tennison Brothers, TDOT, and Ms. Thomas, the court has determined that the motion should be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

FACTS

This case was commenced by the filing of a voluntary petition under Chapter 11 of the Bankruptcy Code on June 2, 2016, in the United States Bankruptcy Court for the Northern District of Florida.

The case was transferred to this court on August 29, 2016. The case was assigned to Bankruptcy Judge David S. Kennedy.

On January 18, 2019, Judge Kennedy granted the motion of Clear Channel seeking appointment of a Chapter 11 trustee. Michael E. Collins was appointed trustee pursuant to the recommendation of the United States Trustee on January 25, 2019.

Since May of 2019, Judge Kennedy has been on medical leave. The other bankruptcy judges sitting in Memphis, Tennessee, have handled Judge Kennedy's cases on a rotating basis.

On July 29, 2019, the court entered a "Notice and Joint Stipulation to Stay Pending Matters Until Ruling by the Sixth Circuit Court of Appeals" submitted by the Trustee, the Debtor, Tennison Brothers, Clear Channel, Ms. Thomas, the City of Memphis, and TDOT. [Dkt. No. 692.] Pursuant to the Notice all matters were held in abeyance until the conclusion of appeals pending before the Sixth Circuit Court of Appeals.

The Sixth Circuit issued its ruling on September 11, 2019. Judge Kennedy was still on leave. The matter was referred to the undersigned, the next most senior judge, for handling. A "Sua Sponte Order and Notice of Case Management Status Conference Combined with Notice of

the Entry Thereof" was issued which scheduled a status conference for October 22, 2019. At the time, it was thought that Judge Kennedy would have returned to active service by that time.

One of the parties requested a rehearing *en banc* before the Sixth Circuit. That motion was still pending on October 22, so the status conference was continued to December 12, 2019. The motion for rehearing was denied on November 6, but it was still hoped that Judge Kennedy would be able to return to active service, so the status conference was continued again to January 16, 2020.

In January, Judge Kennedy became aware that he would not be able to return to a full schedule for some time and asked the undersigned to accept the transfer of this case. Although he did not specify the reasons, the undersigned understood that the request resulted from the fact that the two other Memphis bankruptcy judges are scheduled to retire at the end of June and Judge Kennedy believed that the administration of the case would extend beyond that time. There was no discussion concerning the substance of the case. At Judge Kennedy's request, the "Order Transferring Case" was prepared and signed by the undersigned by interchange in the ordinary course on January 14, 2020. [Dkt. No. 777.]

The undersigned conducted the status conference on January 16, 2020. That was the first time that the undersigned met the Debtor, who appeared on his own behalf. The first substantive order entered by the undersigned is dated January 27, 2020. [Dkt. No. 807.] This followed a discussion with the Debtor at the status conference on January 16, 2020, of the need for persons seeking the allowance of administrative expense claims to file their own applications. The undersigned has continued to administer the case assigned to her in the ordinary course issuing written decisions as necessary. Many of these are the subject of pending appeals.

On March 17, the court entered General Order No. 20-0001, in response to the coronavirus pandemic. It encourages the parties to conduct their business in writing or telephonically whenever possible and suspends all in-person hearings until further order. It directs the parties to notify the chambers of the presiding judge if an evidentiary hearing is required and leaves to the judge's discretion whether and how to conduct requested hearings.

The Debtor, who is reported to be a licensed attorney, filed his "Motion to Disqualify" on March 31, 2020. As grounds for his motion, he recites that:

1. The judge was not randomly selected;
2. The judge issued orders over the objection of the Debtor without hearings;
3. The rulings of the judge call into question her impartiality and personal animosity toward the Debtor.

The Debtor acknowledges that he has appealed six of the orders entered by the undersigned. Four of those appeals are still pending.

ANALYSIS

Alleged Lack of Partiality and Animosity

The Debtor bases his motion upon 28 U.S.C. § 455(a) which is expressly made applicable to bankruptcy judges by Federal Rule of Bankruptcy Procedure 5004(a). Section 455(a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The test to be applied under section 455(a) is whether another person with knowledge of all the circumstances might reasonably question the judge's impartiality. *McBeth v. Nissan Motor Corp. U.S.A.,* 921 F. Supp. 1473, 1477 (D. S.C. 1996) (citing *In re Beard,* 811 F.2d 818, 827 (4th Cir. 1987), and *United States v. Martorano,* 866 F.2d 62, 67 (3rd Cir. 1987)). "This is an objective standard and is not to be

construed to require recusal on spurious or loosely based charges of impartiality." *Id.* See also, *United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir. 1983).

In considering the facts supporting a motion to recuse or disqualify under section 455(a), the source and the character of the basis of recusal must be taken into account. "The disqualifying bias must stem from an extrajudicial source and result in an opinion on the merits in the instant action based on something other than what was learned during participation in the case." *McBeth* at 1477. *See Liteky v. United States*, 510 U.S. 540, 553 (1994) (the extrajudicial source doctrine governs section 455(a)).

Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See, for example, Commercial Paper Holders v. R.W. Hine (Matter of Beverly Hills Bancorp),* 752 F.2d 1334, 1341 (9th Cir. 1984) ("Unfavorable rulings alone are legally insufficient to require recusal, even when the number of such unfavorable rulings is extraordinarily high on a statistical basis.") (internal citation omitted). Unfavorable rulings, in and of themselves, cannot demonstrate reliance upon an extrajudicial source and when the alleged source of bias arises in the context of judicial proceedings, recusal requires a showing that the bias arises from knowledge acquired outside such proceedings. *Id.*

The Debtor, as the moving party, bears the burden of showing that a reasonable person knowing all the circumstances would have doubts concerning the impartiality of the undersigned judge. He has not pointed to any basis for his motion other than orders that have been entered and are the subject of pending appeals. These cannot be the basis for recusal. If the rulings were incorrect, they will be corrected through the normal appellate process. Moreover, the Debtor has not pointed to any extra-judicial source for the rulings that he complains of. He cannot do so

because there are none. The only knowledge the undersigned has of the Debtor or his case has been gained through the written pleadings and courtroom argument.

Alleged Lack of Random Selection

The Debtor also raises as a basis for his motion the alleged lack of randomness in the selection of the undersigned to preside over his case. He has pointed to no authority for this concern.

The assignment of the business of the district courts is governed by 28 U.S.C. § 137, which provides that, "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court," and further that, "[t]he chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe." 28 U.S.C. § 137(a). Although section 137 does not specifically address the bankruptcy courts, the bankruptcy judges in regular active service constitute a unit of the district court. 28 U.S.C. § 151. Section 137 has been applied to the bankruptcy courts in other cases. *See, e.g., Marshall v. Marshall (In re Marshall),* 721 F.3d 1032, 1040 (9th Cir. 2013).

Judge David S. Kennedy was designated Chief Judge of the United States Bankruptcy Court for the Western District of Tennessee by Misc. Civil Order 88-6, entered February 4, 1988, in the United States District Court for the Western District of Tennessee. Under the particular and unusual circumstances that occurred when the pending appeals that had caused the stay of proceedings in this case were concluded, Judge Kennedy made the decision he thought to be in the best interest of all concerned in reassigning this case to the undersigned judge. It has been said that judges are vested with "inherent" authority to transfer cases among themselves "for the

expeditious administration of justice." *Marshall,* 721 F.3d at 1040, citing *United States v. Stone*, 411 F.2d 597, 598 (5th Cir.1969) (*per curiam*). Moreover,

> A party has no due process right to random case assignment or to ensure the selection or avoidance of any particular judge absent a showing of bias or partiality in the proceedings. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (explaining that "a [party] has no right to any particular procedure for the selection of the judge[,]" so long as the decision is made "in a manner free from bias or the desire to influence the outcome of the proceedings"); *Torbert*, 496 F.2d at 157 (holding that non-random assignment of a case did not violate due process, particularly because there was no showing of actual prejudice resulting from the procedural irregularity).

Id.

The Debtor has not shown that the process of assigning his case to the undersigned judge was improper or infringed his rights in any way. It cannot be the basis for disqualification.

Issuance of Orders without Hearings

Finally, the Debtor states that the undersigned judge should be disqualified because orders were issued over his objection without a hearing. In Title 11, the phrase "after notice and a hearing" means "after such notice as is appropriate in the particular circumstances" and after such opportunity for hearing as is appropriate in the particular circumstances. 11 U.S.C. § 102(1)(A). An actual hearing is not required if proper notice is given and such a hearing is not requested timely by a party in interest. 11 U.S.C. § 102(1)(B).

The Debtor provides no authority for his claim that deciding matters over his objection violated his constitutional rights of due process and equal protection. In each of the instances the Debtor refers to, either the Debtor filed the motion or the Debtor filed a written response. The undersigned judge carefully considered his arguments and wrote detailed opinions giving the reasons for her decisions. Each of them turned on questions of law, not of fact. Two of them were issued after the court entered its order of March 17, 2020, suspending all in-person hearings as the

result of the coronavirus pandemic. Three of them were not final orders but dealt with the conduct of status conferences or with interim fee applications. None of these decisions resulted from bias against the Debtor but rather from this judge's perception of the merits of his arguments. As the Debtor points out, he filed appeals from each of the orders he complains of. Two of those appeals have already been dismissed. *See Thomas v. Collins (In re Thomas),* slip. op. No. 20-8003 (B.A.P. 6th Cir. April 23, 2020); *Thomas v. Collins (In re Thomas),* slip. op. No. 20-8005 (B.A.P. 6th Cir. April 23, 2020).

The deciding of matters submitted to the court without an actual hearing does not provide grounds for disqualification. Again, if the decisions of this judge were in error, the errors will be corrected through the appeals process.

CONCLUSION

For the foregoing reasons, the Motion to Disqualify Judge Jennie D. Latta is **DENIED**.

cc: Debtor (pro se)
Ch. 11 Trustee
Attorney for Ch. 11 Trustee
U.S. Trustee
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