SO ORDERED.
SIGNED this 11th day of February, 2021

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

MARGARET ELIZABETH KINNEY

Debtor

Case No. 3:20-bk-30540-SHB
Chapter 7

MEMORANDUM AND ORDER

On February 9, 2021, Debtor and William Kinney, acting jointly and *pro se* ("Movants"), filed an Ex Parte Statement Concerning Dismissal of Adv. Proc. No. 3:20-ap-3032, Request to Issue a Protective Order and Enjoin Further Proceedings ("Request") [Doc. 176].[1] By Order entered February 10, 2021, the Court granted the Request in part by restricting public access to the Request and accompanying Affidavit of William and Margaret Kinney ("Affidavit") [Doc. 177] pursuant to Rule 9037(c) and (d)(2) of the Federal Rules of Bankruptcy Procedure. [Doc. 178.] Because the Request was directed to Chief United States Bankruptcy Judge Shelley D. Rucker and because it raises allegations that the assigned bankruptcy judge should be

[1] William Kinney signed the Request as "Husband of Margaret and party in interest." [Doc. 176]. Mr. Kinney, however, is not a joint debtor and is not an attorney, and his joinder in the Request is inappropriate.

disqualified from presiding over this and related matters, the Court additionally will treat the Request as a motion for disqualification. The Request also seeks appointment of legal representation for Sarah Valdes because of her alleged mental incompetency. Finally, the Request seeks relief relating to *Milligan v. Valdes*, No. 3:20-AP-3032-SHB, to enjoin any further action in that adversary proceeding pending the appointment of legal representation for Ms. Valdes. This Memorandum and Order will address all three issues.

I. REQUEST FOR DISQUALIFICATION OF ASSIGNED BANKRUPTCY JUDGE

The Request was directed to the Chief Bankruptcy Judge for this District, asserting that the assigned bankruptcy judge "was statutorily disqualified for bias, in failing to provide due process of law on July 2, 2020, as well as other times since then." [Doc. 176 at p. 1.] The Affidavit alleges that this Court "sternly threatened [Debtor] about the consequences of not attending the 2004 Exam . . . , pressed [Debtor] to present [her Motion to Quash the 2004 Examination] orally at [the] hearing . . . , [and] demeaned [Debtor] and intimidated her to the point where [Debtor] declined to submit the motion at all due to [the judge's] threats" and that the Court's "attack on [Debtor's] right to defend herself violated [Debtor's] 5th Amendment right to due process of law." [Doc. 177 at ¶ 2.] Thus, Movants argue, "Judge Bauknight was statutorily disqualified under 28 U.S. Code § 455(a) and § 455(b)(1) at this hearing." [*Id.*] Movants infer that the Court must have engaged in ex parte communications with the Chapter 7 Trustee because the Court "had no personal experience with either William or Margaret that might have caused her to pre-emptively react the way she did" by warning Mr. Kinney that he could not speak for Debtor because to do so would constitute the unauthorized practice of law and by counseling Debtor about the consequences of failing to comply with the Court's order. [*Id.*]

Movants are correct that § 455 governs issues of recusal by this Court. *See* Fed. R. Bankr. P. 5004(a). Section 455 divides recusal grounds into two categories. Subsection (a) is concerned only with the appearance of impartiality, and subsection (b) "is concerned with the reality of bias, prejudice, interest or relationship." *Schmude v. Sheahan*, 312 F. Supp. 2d 1047, 1062 (N.D. Ill. 2004). "A party introducing a motion to recuse carries a heavy burden of proof; a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise." *In re Yehud-Monosson USA, Inc.*, 472 B.R. 868, 878 (D. Minn. 2012). Also, "recusal motions are committed to the sound discretion of the . . . court." *Neroni v. Grannis*, No. 3:11-cv-1485, 2016 WL 4386009, at *4 (N.D.N.Y. Aug. 17, 2016).

"The mere motion for recusal based upon an allegation of personal prejudice does not require a judge to step down." *Martuzas v. Reynolds*, 983 F. Supp. 87, 91 (N.D.N.Y. 1997). Indeed, a judge is equally obligated to preside over a case when there is no legitimate reason to recuse as he is to recuse when the law and facts require. *Prescott v. Alejo*, No. 2:09-cv-791-ftm-36SPC, 2010 WL 11507175, at *1 (M.D. Fla. June 22, 2010). Thus, this Court has the responsibility to preside over assigned cases and cannot simply recuse to ease the burden created by vexatious filings with scandalous allegations. *See United States v. Pungitore*, 15 F. Supp. 2d 705, 715 n.4 (E.D. Pa. 1998) ("A liberal recusal policy would encourage judge shopping."); *In re Byers*, 509 B.R. 577, 580 (Bankr. S.D. Ohio 2014) (citing *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."); *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.")).

Looking to the requirements of § 455(a) for showing the existence of an appearance of impartiality, the test "is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain significant doubt about the judge's impartiality." *Prescott*, 2010 WL 11507175, at *1 (quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)). The United States Supreme Court has stated that "opinions formed by the judge on the basis of facts introduced or events occurring in the court 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." *Liteky v. United States*, 510 U.S. 540, 555 (1994), *quoted in In re Royal Manor Mgmt., Inc.*, 525 B.R. at 380. The Supreme Court also stated:

> *Not* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after being [appointed] 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.

Id. at 555-56.

Numerous courts have held that "parties cannot be allowed to create the basis for recusal by their own deliberate actions." *In re Yehud-Monosson USA, Inc.*, 472 B.R. at 878-79 (quoting *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990)); *see also United States v. Bray*, 546 F.2d 851, 858 (10th Cir. 1976) (explaining that "prior written attacks upon a judge are [] legally insufficient to support a charge of bias or prejudice on the part of a judge toward an author" and that "to allow prior derogatory remarks about a judge to cause the latter's compulsory recusal would enable any defendant to cause the recusal of any judge merely by making disparaging statements about him"); *In re Union Leader Corp.*, 292 F.2d 381, 389 (1st Cir. 1961) (stating that

"a judge lives in an atmosphere of strife, in which, by nature and experience, he is expected to be a [person] of fortitude").

First, Movants' allegations that the Court was harsh towards them at the July 2, 2020 hearing are unfounded.[2] So too is the scandalous allegation that the Court engaged in ex parte communications. Movants assume such ex parte communication because the Court "had no personal experience with either William or Margaret that might have caused her to pre-emptively react the way she did, unless, as we believe, somebody had already prepared her." [Doc. 177 at ¶ 3.]

In *preparation* for the July 2, 2020 hearing, the Court reviewed the numerous filings by Movants and Ms. Valdes in the four months after commencement of the bankruptcy case, which filings contained extensive citations to legal authority and were remarkably similar in form and content, especially when considered with William Kinney's Revised Motion to Intervene and Petition for an Order to Vacate Judgment [Doc. 58] and Anderson Lumber Company's Response in Opposition to and Objection to Motion to Intervene and Petition for an Order to Vacate Judgment [Doc. 90]. Indeed, these filings *prepared* the Court to raise the issue of whether Debtor and Ms. Valdes had prepared their own filings and to admonish Mr. Kinney that the Court would not permit him to represent either Debtor or Ms. Valdes because Mr. Kinney is not an attorney.

The question under § 455(a) is whether "a reasonable observer, informed of all the surrounding facts and circumstances, would perceive a significant risk that the judge will resolve

[2] After listening to the recording of the July 2, 2020 hearing before preparing this decision, the Court is convinced that she did not engage in any "threats" or inappropriate tone during the hearing. After paying the ordinary fee, Movants may request a copy of the hearing recording and/or a transcript of the hearing. Furthermore, Movants are directed to the judicial complaints webpage of the United States Court of Appeals for the Sixth Circuit for information about how they may assert a complaint about this judge's conduct to the Chief Judge of the Sixth Circuit Court of Appeals. *See* Judicial Complaints, https://www.ca6.uscourts.gov/judicial-complaints.

the case on a basis other than the merits." *Schmude*, 312 F. Supp. 2d at 1062 (citing *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000)). Most critically, "[t]he decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported.'" *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 914 (2004). "The inquiry is made based on a reasonable person standard, as opposed to 'a hypersensitive or unduly suspicious person.'" *Schmude*, 312 F. Supp. 2d at 1062 (quoting *Hook v. McDade*, 89 F.3d 350, 354 (7th Cir. 1996)). The Sixth Circuit has stated it like this: "The 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); *see also Gresham v. Stewart*, No. 13-10189, 2017 WL 75967, at *1 (E.D. Mich. Jan. 9, 2017) (denying motion to disqualify the judge and finding plaintiff's "fantastical and delusional accusations [to be] completely false"); *Chang Lim v. Terumo Corp.*, No. 11-cv-12983, 2014 WL 1389067, at *3 (E.D. Mich. Apr. 9, 2014) (rejecting the "preposterous," "feckless," and "irresponsible" accusations raised in a motion under § 455).

Further, in deciding a request for recusal under § 455, "the Court is not bound by any facts supplied by the movant, but is free 'to make credibility determinations, assign to the evidence what he believes to be its proper weight, and to contradict the evidence with facts drawn from his personal knowledge." *Elliott v. Plaza Props., Inc.*, No. 2:08v1037, 2010 WL 2541020, at *1 (S.D. Ohio June 18, 2010) (quoting *United States v. Balistrieri*, 779 F.2d 1191, 1201 (7th Cir. 1985)); *see, e.g., In re Russell*, 392 B.R. 315, 377 (Bankr. E.D. Tenn. 2008) (in which Judge Stinnett rejected a recusal demand based on conspiracy allegations by a pro se debtor). And, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current

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." *Liteky*, 510 U.S. at 554.

The Sixth Circuit has made clear that prejudice or bias must be personal or extrajudicial to justify recusal under § 455(a):

> "Personal" bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases. Personal bias arises out of the judge's background and associations. The critical test is whether the alleged bias "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

Wheeler v. Southland Corp., 875 F.2d 1246, 1251-52 (6th Cir. 1989). Thus, a party who seeks to disqualify the judge by pointing only to facts that arise from the judge's "participation in the proceedings or prior contact with related cases" has not supported the demand for recusal. *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990).

Here, neither the Court's conduct during the July 2, 2020 hearing nor the Court's decisions in this case, which have been fully adjudicated by written decisions that are subject to appeal by the appropriate party under Part VIII of the Federal Rules of Bankruptcy Procedure, do not implicate § 455(a).

Turning to § 455(b), which concerns "whether the Court harbors an actual personal bias or prejudice against one party in favor of another party, as opposed to the appearance of impartiality," *Schmude*, 312 F. Supp. 2d at 1066, the burden on the movant is higher. Actual bias or prejudice must be shown by compelling evidence. *Hardy v. Kushman*, No. 09-cv-14825, 2010 WL 3906327, at *7 (E.D. Mich. Sept. 30, 2010) (citing *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1025 (7th Cir. 2000)). The standard under subsection (b) is the same as for subsection (a) – that is, the bias with which § 455(b) is concerned must arise from an extrajudicial source.

Schmude, 312 F. Supp. 2d at 1066.

Concerning the complaints that the Court "threatened William with UPL, then sternly threatened Margaret about the consequences of not attending the 2004 Exam," [Doc. 177 at ¶ 2], as stated by the Seventh Circuit Court of Appeals: "The judge is on the bench in the first place . . . because of superior legal background, expertise, or credentials, and for that reason should not sit as a passive observer who functions solely when called upon by the parties. Rather, the judge should take an active role, when necessary, to ensure fairness and to conform the proceedings to the law." *Jones v. Page*, 76 F.3d 831, 850 (7th Cir. 1996).

Simply, the Movants have failed to show any reason why this Court should recuse or be disqualified under 28 U.S.C. § 455. Accordingly, to the extent that the Request can be construed as a motion for disqualification under § 455, it is denied.

II. REQUEST FOR APPOINTMENT OF COUNSEL FOR SARAH VALDES

The Movants assert that Sarah Valdes suffers from a mental disability. [Doc. 176 at ¶¶ 8-9.] Notwithstanding that they make such a request without admissible evidence to support their conclusion about Ms. Valdes, this Court has no authority to appoint a guardian ad litem or conservator for Ms. Valdes. Nor does any provision of federal law, including 28 U.S.C. § 1915(e)(1), authorize the Court to appoint an attorney to represent Ms. Valdes.

Although Federal Rule of Bankruptcy Procedure 1004.1 directs bankruptcy courts to "appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented," Ms. Valdes is not a debtor before this Court. Alternatively, § 1915(e)(1) authorizes courts to "request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). The supposed basis for seeking legal representation for Ms. Valdes, however, is not that she is unable to afford counsel.

Notably, shortly after the July 2, 2020 hearing, Debtor and Ms. Valdes signed an Agreed Order Continuing 2004 Examination Dates and Further Extending Discharge Deadline ("Agreed Order") [Doc. 136]. That Agreed Order represented an agreement between Debtor, Ms. Valdes, the Chapter 7 Trustee, and Anderson Lumber Company to continue the 2004 examinations that had been set for July 8, 2020 (and that were the subject of the motion to quash referenced by the Movants in the Request and Affidavit). The Agreed Order included the following pertinent statements:

> The parties hereto have agreed to move the dates previously set and discussed with the Court in order to accommodate the issues raised by the debtor and/or Valdes *regarding the opportunity to retain counsel* and also regarding the safety procedures for taking the 2004 examinations.
>
> The Trustee and Anderson are willing to move the 2004 examination dates *to allow the debtor and/or Valdes to secure counsel, if they choose to do so*.
>
> The Debtor and Valdes understand and agree to the new 2004 examination dates and also understand and agree that the continuation of said dates is *adequate and acceptable for purposes of them contacting and retaining counsel if they so choose*.

[Doc. 136 at pp. 1-2 (emphases added).]

The Court questions whether the Movants have standing to seek appointment of counsel for their daughter. Because the Court does not find that it has authority to appoint counsel for Ms. Valdes, it need not reach the question of standing.

Even if the stated basis for the request for appointment of counsel was that Ms. Valdes cannot afford counsel, the standards applicable to appointment under § 1915(e)(1) are not present here. As explained by the bankruptcy court in *In re Larsen*, 406 B.R. 821, 823-24 (Bankr. E.D. Wis. 2009), in which the debtor asked the court to appoint counsel for him in the bankruptcy case:

> The power of a court to appoint counsel under this statute is discretionary, not mandatory. Appointment of counsel in a civil case is not a constitutional right, *Pruitt v. Mote*, 503 F.3d 647, 649, 656–58 (7th Cir.2007), and all bankruptcy

> jurisdiction is civil. There is a presumption that the right to appointed counsel "exist[s] only where the litigant may lose his physical liberty if he loses the litigation," *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981), or assistance of counsel is warranted by exceptional circumstances. *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir.1990). Obviously, [the debtor] cannot lose his liberty in connection with this civil bankruptcy proceeding as he already lost it pursuant to other state court criminal proceedings.
>
> Exceptional circumstances are those "where the facts and legal issues are so novel and complex as to require the assistance of a trained practitioner." *Id.* Several bankruptcy courts have denied the appointment of counsel to represent debtors in bankruptcy cases. *See, e.g., In re Ennis*, 178 B.R. 192, 197–98 (Bankr. W.D. Mo. 1995); *In re Fitzgerald*, 167 B.R. 689, 691 (Bankr. N.D. Ga. 1994). While a court may have the discretion to appoint counsel for indigent parties under 28 U.S.C. § 1915(e)(1), there is some question as to whether section 1915 applies to bankruptcy cases. *Cf. In re Fitzgerald*, 167 B.R. at 691. Even if 28 U.S.C. § 1915(e)(1) applies in bankruptcy court, the section does not authorize expenditure of federal funds to appoint counsel, *Dep't Banking & Fin., State of Nebraska v. Copple*, 84 B.R. 163, 164 (Bankr. D. Neb. 1988).

In short, if the Movants are concerned about their daughter's lack of competency, they can pursue appointment of a conservator for her under state law. If they are concerned about their daughter's lack of legal representation, they can work with her to hire an attorney who can appear before this Court to raise appropriate claims and defenses on Ms. Valdes's behalf. The motion to appoint legal representation for Ms. Valdes is denied.

III. REQUEST FOR A PROTECTIVE ORDER TO ENJOIN THE CHAPTER 7 TRUSTEE

Finally, the Request asks for issuance of a protective order that would "enjoin the Chapter 7 Trustee, or any other persons acting on behalf of the Chapter 7 Trustee, from taking any further action in the adversary proceeding 3:20-ap-03032, including prosecuting any orders, or seeking any orders with regard to the property located at 2444 Allegheny Loop Road, until the court can appoint legal representation for Sarah." [Doc. 177 at ¶ 9.]

Because the Court is without authority to appoint counsel for Ms. Valdes and because no other ground has been asserted for an injunction against the Chapter 7 Trustee to preclude him

from engaging in his duties under the Bankruptcy Code, even if the Court could find that the Movants have standing for such a request, this aspect of the Request is also denied.[3]

IV. CONCLUSION

For these reasons, the Court directs the following:

1. To the extent that the Request seeks disqualification of the assigned bankruptcy judge pursuant to 28 U.S.C. § 455, the request is DENIED.

2. To the extent that the Request seeks appointment of a guardian ad litem or of legal counsel for Sarah Valdes, the request is DENIED.

3. To the extent that the Request seeks an injunction against the Chapter 7 Trustee "from taking any further action in the adversary proceedings [*sic*] of Case 3:20-ap-3032, including prosecuting any orders, or seeking any orders with regard to the property located at 2444 Allegheny Loop Road, to reset Adv. Compl. 3:20-ap-3032 to its originally [*sic*] filing date of June 30, 2020, until the court can appoint legal representation for [Ms. Valdes]," the Request is DENIED.

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[3] The Court also notes that the entry of summary judgment on February 5, 2021, fully resolves that adversary proceeding before this Court. [Judgment, *Milligan v. Valdes*, No. 3:20-AP-3032-SHB, ECF No. 81.]. The Court expects that the Chapter 7 Trustee in due course will file a motion for sale of the property in the bankruptcy case. At that time, the Court will adjudicate such a motion after notice and hearing.