CASE NO.: 8:16-CV-02046-JSM
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re OILEDKIN GONZALEZ, Debtor.

CADLEROCK JOINT VENTURE L.P., Appellant,

v.

CHRISTINE HERENDEEN, et al., Appellees.

On Appeal from the United States Bankruptcy Court
for the Middle District of Florida
Case No. 8:12-bk-19213-KRM

ANSWER BRIEF OF APPELLEES LASH & WILCOX PL AND THOMAS A. LASH, ESQUIRE

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CORPORATE DISCLOSURE STATEMENT

Lash & Wilcox PL, now known as Lash Wilcox & Grace PL, was at the relevant times a Florida limited partnership. Thomas A. Lash, Esq. and John Wilcox, Esq., at the relevant times, owned a 10% or more interest in Lash & Wilcox PL.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Lash & Wilcox PL and Thomas A. Lash, Esquire, do not believe oral argument is necessary to decide the issues raised in this appeal but are prepared to make oral argument upon request.

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STANDARD OF REVIEW

I. The bankruptcy court's decision whether to impose sanctions under 11 U.S.C. Section 105(a) or 28 U.S.C. Section 1927 is reviewed for abuse of discretion. *Adams v. Austal, U.S.A., L.L.C.*, 569 Fed. Appx. 728, 731 (11th Cir. 2014); *In re O'Lone*, 405 Fed. Appx 413, 414 (11th Cir. 2010). Under that standard, the reviewing court "must affirm unless [it finds] that the [lower] court has made a clear error of judgment, or has applied the wrong legal standard." *In re O'Lone*, 405 Fed. Appx at 414 (quoting *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir.2007)).

II. The bankruptcy court's discovery orders are also reviewed for abuse of discretion. *In re Piper Aircraft Corp.*, 362 F.3d 736, 738 (11th Cir. 2004).

III. The bankruptcy court's denial of the motion to recuse is likewise reviewed for abuse of discretion. *Tucker v. Mukamal*, 2015 WL 5166276, at *2 (11th Cir. Sept. 4, 2015).

STATEMENT OF THE CASE

I. Introduction

This appeal involves a Motion for Sanctions under 11 U.S.C. Section 105(a) or 28 U.S.C. Section 1927 filed by Cadlerock Joint Venture, L.P. ("Cadlerock"). Cadlerock's Initial Brief contains extensive argument, allegations, and speculation in the guise of facts, largely without citation to the record. The relevant facts here are well-developed following extensive discovery, however, and are simple, straightforward, and not in dispute. Taking those facts and the pertinent legal standards into account, the bankruptcy court correctly exercised its discretion to deny Cadlerock's motion for sanctions.

II. Course of proceedings and disposition in the court below

Oiledkin Gonzalez filed for bankruptcy in December 2012. R2-6. Christine Herendeen (the "Trustee") was appointed the Chapter 7 Trustee. R2-7. Thomas Lash and the Lash & Wilcox law firm ("Special Counsel") were approved to serve as Special Counsel to the Trustee. R2-12, 2-13. On behalf of the Trustee, Special Counsel filed an adversary proceeding against Cadlerock alleging consumer protection violations on November 8, 2013. R2-164. On December 17, 2013, Special Counsel voluntarily dismissed the adversary proceeding with prejudice. R2-173.

Almost a year later, in November 2014, Cadlerock filed a Motion to Reopen, requesting that the bankruptcy case be reopened to allow Cadlerock to file a Motion for Leave to sue the Trustee and Special Counsel. R2-19; R2-20. After the bankruptcy court denied Cadlerock's Motion to Reopen, R2-42, Cadlerock appealed to the district court, which affirmed. R2-51.

In July 2015, Cadlerock filed a new Motion to Reopen, this time to file a Motion for Sanctions against the Trustee and Special Counsel. R2-52. Cadlerock also filed a Motion to Recuse Bankruptcy Court Judge May from hearing the proceedings. R2-53. Judge May granted Cadlerock's Motion to Reopen for the purposes of filing a Motion for Sanctions. R2-80. He denied Cadlerock's Motion to Recuse. R2-81.

Cadlerock's filed a Motion for Sanctions requesting sanctions against the Trustee and Special Counsel under Section 1927 and Section 105(a). R2-69. In the course of discovery, Special Counsel filed a Motion to Stay Discovery and for Protective Order, R2-85, which the bankruptcy court granted in part and denied in part. R2-101. Special Counsel filed a Motion for Reconsideration of that order. R2-102. The bankruptcy court granted Special Counsel's Motion for Reconsideration. R2-115. Also in the course of discovery regarding the Motion for Sanctions, Special Counsel filed a Motion for Protective Order regarding the use of video depositions, R2-118, which the bankruptcy court granted, R2-134.

Following nine months of discovery, Special Counsel filed a Motion for Summary Judgment regarding the Motion for Sanctions. R2-142-52. Cadlerock responded to the motion, R2-155-56. The bankruptcy court held a hearing on the motion, R2-157, and entered an order granting summary judgment and holding that sanctions are not warranted against the Trustee or Special Counsel under Section 1927 or Section 105(a). R2-2.

III. Statement of Facts

A. Facts relating to the Motion for Sanctions

1. The undisputed facts relevant to the Motion for Sanctions

At the time it decided Cadlerock's Motion for Sanctions, the bankruptcy court had before it an extensive, well-developed factual record of more than 100 pages of record evidence that included nine deposition transcripts, written discovery responses, and other documents. Docs. 2-143-2-152; Doc. 156. This record reflected the undisputed facts set forth below regarding Special Counsel, the Trustee, and Cadlerock; Cadlerock's acquisition of the Gonzalez debt and subsequent attempts to collect that debt; and the adversary proceeding against Cadlerock.

a. Undisputed facts regarding the Trustee, Special Counsel, and their roles

Ms. Herendeen was admitted to the Florida Bar in 1996. R2-147 at 7. Throughout her legal career, the focus of her practice has been bankruptcy. R2-147 at 7-8. She founded her own law firm approximately five and a half years ago, and during that time has served as a Trustee in bankruptcy. R2-147 at 6, 8.

Mr. Lash has been licensed to practice law in the state of Florida since 1990. R2-148 at 7. His primary practice area is bankruptcy. R2-148 at 8. He has represented creditors, debtors and bankruptcy trustees. *Id*. Mr. Lash eventually came to focus his practice on consumer collection rights. *Id.* He has more than a decade of experience litigating consumer collection practices actions on behalf of plaintiffs. R2-148 at 111. The Lash & Wilcox law firm was founded in 2009. R2-148 at 7-8. It serves as special counsel to the Trustee regarding unlawful collection actions. R2-148 at 13.

Title 11 Section 341 of the Bankruptcy Code requires trustees to convene and preside over a meeting of creditors and to orally examine the debtor. "Trustees and, when hired, special counsel are charged with the duty to identify and liquidate claims belonging to the estate. Potential claims based on violations of consumer protection statutes such as the Fair Debt Collection Practices Act, the Florida Consumer Collection Practices Act, and the Telephone Consumer

Protection Act, if based on prepetition collection activity, are claims belonging to the estate and available to the trustee. Trustees are obligated to investigate and pursue those claims, if plausibly valid." R2-42 at 2.

In her role as Trustee, Ms. Herendeen makes the decision whether to seek legal representation on a case-by-case basis. R2-147 at 10. As Trustee, she began retaining the Lash & Wilcox law firm as Special Counsel for bankruptcy estates in 2012. R2-147 at 12-13. The role of Special Counsel in representing Ms. Herendeen as bankruptcy Trustee is to assist her in reviewing potential claims she identifies in her cases, and if Special Counsel agree that a potential claim exists, she seeks court approval to employ them to litigate the claim on behalf of the bankruptcy estate. R2-147 at 18-19.

It is part of Special Counsel's representation of the Trustee that Special Counsel send a paralegal to 341 meetings to assist in administrative tasks at the meetings, such as handing out a questionnaire prior to the 341 meeting and asking the debtor's counsel, or if unrepresented, the debtor, to complete it so that the Trustee has information on the debtor's potential consumer collection claims. R2-147 at 20-22; R2-148 at 13-14. The Trustee questions debtors under oath during the 341 meeting, including about their potential consumer collection claims to get more detail about the potential claims and obtain the debtor's responses under oath. R2-147 at 22.

The same paralegal generally attends all 341 meetings in cases in which Ms. Herendeen is the Trustee. R2-149 at 15. During the 341 meeting, Special Counsel's paralegal makes notes regarding the debtor's testimony on a copy of the questionnaire and fills it out based on the information the debtor testifies to. R2-149 at 33.

Following the 341 meeting, the Trustee decides based on the debtor's testimony whether there is a potential consumer collection claim she is interested in pursuing. R2-147 at 22, 30. Special Counsel's paralegal does not make the decision whether there are valid consumer collection claims involving the debtor. R2-147 at 29.

In cases where there is a potential consumer claim the Trustee is interested in pursuing, Special Counsel decides whether it believes there is a potential consumer violation. R2-147 at 22. After the 341 meeting Special Counsel's paralegal records her notes on a summary form. R2-148 at 23. That form is provided to Mr. Lash for his review along with the documents related to that case, including the questionnaire completed by the debtor. R2-148 at 23. The purpose of Mr. Lash's review is to determine whether the Lash & Wilcox law firm is interested in being retained on a contingency fee basis to serve as special counsel to review any potential collection actions and possibly file them. R2-148 at 18.

After reviewing the documents regarding a case, Mr. Lash decides whether the law firm wishes to be retained in that matter. R2-148 at 26. If so, a motion to retain counsel and a declaration of Mr. Lash are prepared and provided to the Trustee. R2-148 at 26.

Special Counsel are paid only if there is a recovery to the bankruptcy estate. R2-147 at 23.

b. Undisputed facts relating to the Cadle companies and Cadlerock

Cadlerock is one of approximately 38 related entities (the "Cadle entities"). R2-144 at 15. The Cadle Company is the manager or general partner of each of the Cadle entities. R2-144 at 18. Daniel Cadle is the 100% owner of The Cadle Company. R2-144 at 14. Approximately 60 employees work for the Cadle entities. R2-150 at 57.

The Cadle entities, including Cadlerock, are in the business of buying defaulted loans at a discount and collecting payments on them. R2-144 at 14; R2-150 at 106. They routinely file lawsuits when consumers do not pay on debts the company has acquired. R2-144 at 153-54. Daniel Cadle acknowledged that the Cadle entities sometimes make mistakes in the litigation they file. R2-144 at 136. He testified to his opinion that as long as the plaintiff believes the allegations in a lawsuit are true at the time the lawsuit is filed, there was nothing

wrong with filing the lawsuit, even if it later turned out those allegations were inaccurate. R2-144 at 167.

The Cadle companies do not provide their employees with training regarding the requirements of Florida law for debt collectors. R2-143 at 16; R2-145 at 47, 107-08; R2-150 at 31.

c. Undisputed facts regarding Cadlerock's acquisition of the Gonzalez debt

Mr. Gonzalez did not obtain credit directly from Cadlerock. R2-144 at 33. Instead, Cadlerock obtained Mr. Gonzalez's account in a pool of 1,599 unsecured second mortgages it purchased from GMAC Mortgage LLC. R2-144 Ex. 1; R2-150 at 33. The seller did not guarantee that the debts contained in the mortgage pool, including Mr. Gonzalez's debt, were legally enforceable, i.e., that the buyer would be legally entitled to collect on the debt. R2-144 at 32 & Ex. 1.

Cadlerock obtained the mortgage pool at a deep discount because other banks and investment companies were not buying loans due to the financial crisis in 2008 and 2009, as well as because of the collectability issues regarding these unsecured, defaulted notes, and seller's express disclaimers regarding the enforceability of the notes. R2-144 at 26, 55. Of the amount Cadlerock paid for the mortgage pool, the amount attributed to Mr. Gonzalez's mortgage was $172.99 – or 0.06% of the principal balance of the mortgage (less than one cent on the dollar). R2-150 at 41-42.

Mr. Gonzalez's debt originated with a $29,000 second mortgage with SouthStar Funding, LLC, reflected in a Note dated May 4, 2006. R2-144 Ex. 2. On March 11, 2007, SouthStar filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Georgia. Case No. 07-65842 (N.D. Ga. Bankr.). Attached to the Gonzalez Note is an Allonge transferring ownership of the Note from SouthStar to GMAC. R2-144 at Ex. 2 at 4. The Allonge is undated, *id.*, and the documents otherwise do not establish when the transfer from SouthStar to GMAC took place. Daniel Cadle admitted that Cadlerock had no way of knowing when the transfer from SouthStar to GMAC took place, or whether it was before SouthStar declared bankruptcy. R2-144 at 35.

On January 12, 2009, a Limited Signing Officer for Homecomings Financial, LLC, executed a Limited Power of Attorney on behalf of Homecomings and a list of entities, including GMAC appointing Cadlerock its attorney-in-fact for purposes of executing documents related to the transfer of the unsecured mortgage notes. R2-144 at Ex. 1 at 12. A second Allonge is attached to the Gonzalez Note transferring ownership of the Note from GMAC to Cadlerock. R2-144 at Ex. 2 at 5. That Allonge was executed by William Shaulis, the Executive Vice President of Cadlerock, acting as attorney-in-fact for Homecomings. *Id.* Mr. Shaulis acknowledged that he does not know how Homecomings had the authority to transfer ownership of the note on behalf of

GMAC. R2-150 at 21. There is no documentation to show that Homecomings had the authority to transfer the loan for GMAC. R2-150 at 99-100.

Cadlerock did no due diligence regarding the enforceability of Mr. Gonzalez's debt beyond reviewing the documents the seller provided. R2-144 at 28.

d. Undisputed facts regarding Cadlerock's attempts to collect from Mr. Gonzalez and lawsuit against him

Cadlerock was the only Cadle entity that made collection efforts on Mr. Gonzalez's debt. R2-145 at 24-25. Cadlerock is not licensed as a debt collector in Florida. R2-144 at 30.

The payment history Cadlerock had on Mr. Gonzalez's loan, R2-144 Ex. 4, was provided to Cadlerock by GMAC. R2-144 at 59. "Very little" was done to verify the accuracy of the information GMAC provided before Cadlerock attempted to collect the debt or sued Mr. Gonzalez on the debt. R2-144 at 61. Cadlerock did not request bank records or sworn testimony supporting that information. R2-144 at 61. Nor did Cadlerock contact SouthStar or GMAC to verify what either entity had been paid or when. R2-145 at 37-38.

The Cadlerock account officer responsible for attempting to collect on Mr. Gonzalez's account was Gregory Cadle. R2-145 at 11-14, Ex. 1. Neither Gregory Cadle, Cadlerock's General Counsel Victor Buente, nor Daniel Cadle

was able to verify whether Cadlerock had the original note on Mr. Gonzalez's debt. R2-144 at 34; R2-150 at 18.

In the course of its attempts to collect on the Gonzalez debt, Cadlerock sent Mr. Gonzalez letters, made telephone calls to him on his cell phone, and sued him. R2-146 Ex. 3-7.

i. Cadlerock's letters to Mr. Gonzalez

Cadlerock sent Mr. Gonzalez a letter in 2009, notifying him that Cadlerock had acquired his loan from GMAC and requesting that future payments be made to Cadlerock. R2-146 at Ex. 3. Cadlerock sent Mr. Gonzalez a letter in June 2012, notifying Mr. Gonzalez that he was in default on the debt, demanding immediate payment of $13,520.23, and stating that if he did not cure the default within ten days, Cadlerock would accelerate the maturity date on the note and demand immediate payment of $41,747.84. R2-146 at Ex. 5. In July 2012, Cadlerock sent Mr. Gonzalez a letter demanding immediate payment of $42,029.27, and stating that if that amount was not immediately paid in full, Cadlerock might sue him. R2-146 at Ex. 6. Gregory Cadle did nothing to verify the information provided by the seller of the Gonzalez debt before sending Mr. Gonzalez collection letters. R2-145 at 41.

ii. Cadlerock's calls to Mr. Gonzalez

Cadlerock produced in the sanctions litigation a call log listing six calls it acknowledges making to Mr. Gonzalez's cell phone. R2-145 at Ex. 1. Cadlerock's call log shows three calls being made to Mr. Gonzalez's cell phone on June 1, 2012, two calls being made to Mr. Gonzalez's cell phone on June 25, 2012, and a call being made to Mr. Gonzalez's cell phone on October 25, 2012. *Id.*

It is unclear whether the call log Cadlerock produced includes all calls made to Mr. Gonzalez's cell phone. Daniel Cadle acknowledged that the list appears to include only completed calls, that is, calls where Mr. Gonzalez picked up or the caller reached a recording, and not call attempts. R2-144 at 72. Gregory Cadle does not know how the call log was prepared and cannot vouch for its accuracy. R2-145 at 27, 135. While Cadlerock has an electronic accounts note system, call notes are entered into the system manually. R2-145 at 26, Ex. 1. Gregory Cadle does not always enter a note regarding his calls or call attempts. R2-145 at 27. For example, although Cadlerock's call log states he called Mr. Gonzalez three times on June 1, he did not make a note of any of those calls in the account notes system. R2-145 at 29. The Cadle companies do not audio record their calls with debtors. R2-145 at 35.

Mr. Gonzalez testified that he believes Cadlerock called him more than six times, but he is not certain of the precise number. R2-146 at 17, 76-77. He spoke

to the Cadlerock representative a few times, and sometimes hung up as soon as he realized who was calling. R2-146 at 19. Mr. Gonzalez testified he was shocked when Cadlerock called him because the cell phone number Cadlerock called him on was a new number and he did not understand how they had obtained the number. R2-146 at 14, 46. Mr. Gonzalez also received many calls he believes were from Cadlerock that he didn't answer. R2-146 at 67.

Mr. Gonzalez testified he got "really mad" about Cadlerock calling him, because it called him two or three times in the same day when he was at the hospital. R2-146 at 29, 39. He asked them to stop calling him. R2-146 at 29. Mr. Gonzalez also instructed Cadlerock to stop calling him on a day he was going to a job interview. R2-146 at 68. Cadlerock did not stop calling him after he made those requests. R2-146 at 36, 67. Gregory Cadle testified he believes that he is not required to honor a debtor's request to stop calling unless he gets a cease and desist request in writing. R2-145 at 33.

Mr. Gonzalez told Cadlerock he couldn't pay them. R2-146 at 36. The Cadlerock representative told Mr. Gonzalez Cadlerock could put him on a payment plan; however, Mr. Gonzalez said that he didn't have any money and was going to declare bankruptcy. R2-146 at 16. Mr. Gonzalez testified he felt like the Cadlerock representative was pressuring him. R2-146 at 69. Gregory

Cadle testified that if a debtor informs him that he or she cannot pay a debt, he would "[o]f course" keep calling "[b]ecause they owe the money." R2-145 at 34.

At the time of these events, Mr. Gonzalez was suffering from depression. R2-146 at 72. The calls from Cadlerock caused him stress. R2-146 at 72.

iii. Cadlerock's lawsuit against Mr. Gonzalez

On September 25, 2012, Cadlerock sued Mr. Gonzalez for breach of promissory note. R2-146 at Ex. 7. Gregory Cadle testified he took no action to investigate the accuracy of the payment history the seller had provided Cadlerock or otherwise investigate the validity or enforceability of the Gonzalez debt before initiating the lawsuit. R2-145 at 37-38, 43. Cadlerock's General Counsel does not advise Cadle account officers to look beyond the payment records provided by the seller before filing a lawsuit against the debtor. R2-143 at 23. Nor does Cadlerock's General Counsel advise account officers that they should obtain sworn testimony in support of the payment record before filing a lawsuit based on it. R2-143 at 24.

e. Undisputed facts regarding the adversary proceeding complaint

Mr. Gonzalez listed the Cadlerock debt on his bankruptcy petition. R2-8. The Section 341 meeting of creditors took place on February 8, 2013. R2-7.

At the Section 341 meeting, Mr. Gonzalez completed a questionnaire in which he identified Cadlerock as a creditor that called his cell phone. R2-147 at 33-34, Ex. 1. Mr. Gonzalez also testified at the 341 meeting that from August 2012 to the beginning of October 2012, Cadlerock had called him on his cell phone three to four times every two to three weeks. R2-46 at 9-10, 13. Mr. Gonzalez further testified that Cadlerock continued to call him after he told Cadlerock he could not pay and instructed Cadlerock to stop calling. *Id*. at 10.

The Trustee identified Mr. Gonzalez's case as a potential consumer collection claim for Special Counsel to review based on Mr. Gonzalez's testimony. R2-147 at 35, 55-56. Before the adversary proceeding against Cadlerock was filed, the case would have gone through a number of review steps involving multiple law firm employees. R2-148 at 29. Special Counsel's paralegal would have been present at the 341 meeting and made notes of the debtor's testimony. R2-147 at 26; R2-148 at 51. Mr. Lash would have reviewed the debtor's questionnaire and other documents prepared by the paralegal who attended the 341 meeting before making a decision whether to accept the case on

a contingency basis. R2-148 at 52. He would also have been provided and reviewed those documents when he reviewed the complaint before filing. R2-148 at 52. A paralegal would have reviewed the recording of the 341 meeting during the process of preparing the preliminary information for the complaint and an associate attorney would have reviewed the 341 meeting recording before the complaint was filed. R2-148 at 51-52.

Before the adversary proceeding is filed, Special Counsel sends the Trustee the motion and declaration to employ Special Counsel. R2-148 at 29. The Trustee was not involved in the drafting of the adversary proceeding complaint and did not review it before it was filed. R2-147 at 80-81. She did not file anything or conduct any discovery. *Id.* at 88. She was the client. *Id.*

On October 12, 2013, Mr. Lash reviewed and finalized the draft complaint. R2-148 at 49. On October 20, 2013, an associate attorney reviewed the recording of the 341 meeting and drafted a memo to the file. R2-148 at 50. On November 2, 2013, the Trustee filed with the bankruptcy court an application to employ Mr. Lash and the Lash & Wilcox law firm as Special Counsel. R2-12. The Application was approved by the Court. R2-13.

The adversary proceeding complaint was filed on November 8, 2013. R2-164. The complaint alleged claims against Cadlerock under the Florida

Consumer Collections Practices Act and the Telephone Consumer Protection Act. *Id.*

The complaint against Cadlerock contained a mistake. R2-148 at 58, 84. Although the complaint alleged that the collection calls took place between August 1, 2011, and September 25, 2012, the correct beginning date was August 2012. R2-148 at 57-58. Further, as a result of a calculation based on the frequency of calls and the erroneous date range, the complaint erroneously alleged there were more than fifty collection calls. R2-148 at 59.

Finally, the allegation that Cadlerock used an automatic telephone dialing system to call the debtor's cell phone was also a mistake. R2-148 at 62-63. This allegation was a reasonable inference based on Special Counsel's incorrect understanding regarding the number of calls made and the time period in which they were made. R2-148 at 62-65. It is standard industry practice for debt collectors to use an automatic telephone dialing system. R2-148 at 64, 111-12. In order to file under the TCPA, it is necessary to infer the use of an automatic telephone dialing system because it is generally not possible to know with certainty whether a collector uses such a system. R2-148 at 64, 112-13.

Special Counsel did not obtain cell phone records from Mr. Gonzalez before filing the complaint. R2-148 at 46. There are several reasons Special Counsel do not generally request cell phone records from debtors. R2-148 at

107-08. Bankruptcy debtors have often had a number of cell phones over the years; they do not necessarily recall all of their cell phone numbers or keep their cell phone records. R2-148 at 107-08. It would also be futile to obtain cell phone records in many cases, in that Special Counsel would not necessarily know what numbers a particular creditor or collector had called from. R2-148 at 108. Further, cell phone records can be expensive to obtain, costing between $200 and $600, and require the issuance of a third party subpoena. R2-148 at 108.

There is a potential inconsistency between Mr. Gonzalez's written responses on the questionnaire and his oral 341 meeting testimony. R2-147 at 47, Ex. 1. Mr. Gonzalez speaks some English, but does not write in English. R2-146 at 8. Special Counsel rely on the sworn testimony debtors provide in the 341 meeting in investigating a matter. R2-148 at 109. Special Counsel give more weight to the 341 testimony than to the questionnaire responses because it is sworn testimony, akin to deposition testimony, while the questionnaire is unsworn, and is more analogous to unsworn interrogatory responses. R2-148 at 110. Likewise, a follow-up conversation with the debtor after the 341 hearing would also be unsworn. R2-148 at 110.

Mr. Lash testified that the erroneous allegations in the adversary proceeding were unintentional. R2-148 at 114. Prior to the Gonzalez matter, Mr. Lash had never heard of Cadlerock or its principal, Daniel Cadle. R2-148 at 114.

He had no reason to bear ill will or bad faith against them. *Id*. The process at the Lash & Wilcox law firm has changed since the relevant time period; Mr. Lash is now the last person to review every complaint before filing. R2-148 at 50, 95.

f. Undisputed facts regarding the dismissal of the adversary proceeding complaint

On November 20, 2013, Daniel Cadle wrote a letter to Special Counsel. R2-144 at Ex. 7. The letter from Mr. Cadle denied wrongdoing, requested withdrawal of the complaint, and requested additional information in the form of phone numbers. *Id.* The letter took issue with Mr. Gonzalez's sworn testimony, stating that Cadlerock did not leave automated messages for the debtor. *Id.* It made no mention of automated dialer usage, the number of calls, or the contact between Cadlerock and Mr. Gonzalez. *Id.*

On December 9, 2013, Cadlerock filed an unopposed motion for extension of time to respond to the Complaint, which was granted. R2-5.

On December 10, 2013, counsel for Cadlerock served on Special Counsel a letter pursuant to Federal Rule of Bankruptcy Procedure 9011 alleging the complaint was factually inaccurate. R2-29. The December 10 letter included for the first time information regarding the number of calls and the results of the calls, as well as details about the type of equipment used to initiate the calls. *Id.*

Mr. Lash testified that after receiving the Rule 9011 letter, Special Counsel and the Trustee could have amended the complaint against Cadlerock. R2-148 at 113. However, Mr. Lash believed doing so would present more burden than benefit to the bankruptcy estate and that dismissing the complaint was the right thing to do. R2-148 at 113.

Accordingly, on December 17, 2013, one week after service of the Rule 9011 letter, and two weeks before the Rule 9011 safe harbor time period expired, the Trustee through Special Counsel filed a notice of voluntary dismissal of the adversary proceeding with prejudice. R2-173. The adversary proceeding was closed on December 27, 2013. R2-5 at 3.

Cadlerock paid the Ferguson, Skipper law firm just under $3,000 for its services during the time period in which the adversary proceeding was open. R2-144 at 120. It never filed an answer or a motion to dismiss. R2-5. It was never required to appear for a pretrial conference. *Id.* There was no case management activity or discovery. *Id.* Cadlerock did not move for sanctions, costs, or fees under the Bankruptcy Code or Bankruptcy Rules, federal law, or Florida law while the adversary proceeding or bankruptcy case was still open. *Id.*; R12-2 at 2-7.

The adversary proceeding was open from November 8, 2013, to December 27, 2013, and consisted of ten docket entries. R2-5. The bankruptcy case was

closed on February 11, 2014. R12-3. Prior to the filing of Cadlerock's first Motion to Reopen, it consisted of thirty docket entries. R12-2 at 2-7.

g. Undisputed facts regarding Cadlerock's response to the filing of the adversary proceeding

Beginning in November 2013, shortly after Cadlerock was served, Cadlerock employees began acquiring and reviewing court records regarding adversary proceedings Special Counsel filed on behalf of Ms. Herendeen and other bankruptcy trustees. R2-144 at 74. In November and December 2013, Gregory Cadle spent 100 hours researching creditors who were sued in bankruptcy court by trustees; he did this in order to prepare for a potential class action lawsuit. R2-145 at 55-57. This included researching other bankruptcy cases in which consumer cases had been filed on behalf of a trustee and listening to recordings of 341 meetings. R2-145 at 126-27.

Cadlerock prepared a list of about 900 lawsuits spanning several years involving the Lash & Wilcox law firm or Ms. Herendeen as a trustee. R2-144 at 149. Cadlerock has produced in the sanctions litigation three file boxes of documents Cadlerock employees retrieved in November 2012. R2-142 at 25. These documents include docket sheets, cover sheets, and complaints Special Counsel filed on behalf of bankruptcy trustees. *Id.* All of the documents were printed between November 20, 2013, and November 26, 2013. *Id.*

Although the bankruptcy case was open for a period of months after the adversary proceeding was dismissed, Cadlerock chose not to seek fees or sanctions within that time period. R2-144 at 94. Contrary to what it later represented to this Court and the bankruptcy court, *see infra*, the reason Cadlerock did not move for sanctions or fees or otherwise take action while the bankruptcy case was still open was that Daniel Cadle had not made a decision yet regarding whether to file a RICO lawsuit. *Id.* at 93. The concept of filing a class action lawsuit occurred to him while the adversary proceeding was still pending. *Id.* at 104. He started thinking about filing a RICO class action at the time he hired an attorney to respond to the adversary proceeding. *Id.* at 147.

1. Cadlerock's post-adversary proceeding litigation

a. Cadlerock's first motion to reopen

In November 2014, almost ten months after the bankruptcy case was closed, Cadlerock filed its Motion to Reopen, requesting that the bankruptcy case be reopened for Cadlerock to file a Motion for Leave to sue the Trustee and Special Counsel. R2-19; R2-20. The proposed Complaint Cadlerock sought leave to file would have asserted twelve claims based on the filing of the case against Cadlerock, including federal and state RICO claims and claims for malicious prosecution and civil conspiracy. R2-25.

The bankruptcy court denied the Motion to Reopen. R2-44. After the bankruptcy court had announced its ruling that it would deny Cadlerock's Motion to Reopen, Cadlerock filed: a Motion to Confirm Non-Core Proceeding and a supporting memorandum, R2-35, R2-37; a Motion to Allow a Motion, R2-36; and an Objection to Entry of the Order on the Motion to Reopen, R2-38.

The bankruptcy court struck the Motion to Confirm, R2-39, Motion to Allow Motion, R2-40, and Objection to Entry of the Order, R2-41, because it lacked jurisdiction to consider them. On December 19, 2014, it entered an order denying Cadlerock's Motion to Reopen. R2-42.

b. Cadlerock's first three appeals

Cadlerock took three appeals from the Order denying its Motion to Reopen and the Orders striking the Motion to Confirm and the Objection, which were consolidated and heard by this Court. R2-66.

At oral argument before this Court, Cadlerock made a series of representations regarding the reasons for the timing of its motion to reopen and why it had not acted while the bankruptcy case was open. R2-65 at 5-6, 36. These representations included statements that: "[s]everal months" after the adversary proceeding was dismissed, Cadlerock "discovered there had been a pattern of filing of similar lawsuits …;" Cadlerock's discovery of other similar lawsuits "was several months after … the appellees had dismissed with prejudice

the adversary proceeding against Cadlerock;" "[a]t the time it was dismissed Cadlerock was unaware of these other cases and other proceedings;" "[o]nce Cadlerock learned of this pattern of wrongful conduct, it determined to seek relief for itself and other creditors …;" *id.* at 5-6, "Cadlerock didn't know the extent of the conduct. They thought it was an isolated incident at the time;" and "Cadlerock had no knowledge of other similar actions. It wasn't until they took the extraordinary step of investigating the bankruptcy court records regarding other similar cases that they discovered the extent of the conduct;" *id.* at 36.

The Court held that the bankruptcy court had not abused its discretion, affirmed the Order denying the Motion to Reopen, and dismissed the appeals of the Orders striking the Motion to Confirm and the Objection for lack of jurisdiction. R2-51.

c. Cadlerock's Second Motion to Reopen and Motion for Sanctions

Cadlerock then filed its second Motion to Reopen, R2-52, along with a proposed Motion for Sanctions, R2-54, and a Memorandum of Law, R2-64. The proposed Motion for Sanctions made a series of factual assertions regarding the litigation of the adversary proceeding and other adversary proceedings initiated by the Trustee and Special Counsel. R2-54 at 1-8. It sought sanctions under Section 105(a) and Section 1927. *Id.* at 8-10. The sanctions requested included:

terminating the Trustee's services as a bankruptcy trustee and barring her from serving as a trustee in any bankruptcy court in the country; investigating all Middle District of Florida bankruptcy trustees and barring them from serving as a trustee in any bankruptcy court in the country if they engaged in similar conduct; and disbarring from the Middle District of Florida Bankruptcy Court bankruptcy the Trustee, all other bankruptcy trustees who engaged in similar conduct, Mr. Lash, and all of the current and former attorneys of the Lash & Wilcox law firm who have represented trustees in asserting consumer protection claims in bankruptcy court. R2-54 at 11. Cadlerock further sought a return of all monies collected in every adversary proceeding regardless of the case, the defendant, or case-specific circumstances resulting in the payment. *Id.* Cadlerock requested that the Trustee and Special Counsel pay the attorney's fees and costs of any defendant they had sued for a consumer protection violation. *Id.* Cadlerock also sought a variety of additional sanctions, including but not limited to the adoption of Local Rules and referral of the matter to the U.S. Trustee, the Department of Justice, the Florida Attorney General, and the Florida Bar for investigation. *Id.* at 11-12.

Special Counsel responded to the motion. R12-11. Their response explained that many of Cadlerock's allegations and arguments regarding the conduct of Special Counsel and the Trustee in other cases were mistaken. *Id.* at

12-17. For example, Special Counsel's purpose in bringing suits on behalf of bankruptcy trustees is not, as Cadlerock urged, to extract or extort funds, but to represent bankruptcy trustees in claims they are obligated to pursue, on behalf of a particularly vulnerable class of persons. *Id.* at 12. Special Counsel also explained that Cadlerock's suggestion that the number of consumer protection claims the Trustee and Special Counsel file and dismiss was mistaken, in that Special Counsel file a small fraction of the claims available to them,[1] and dismissals take place in a variety of different scenarios.[2] *Id.* at 13-15.

[1] The bankruptcy court's public records showed that over the prior four years, there had been approximately 61,161 total bankruptcy filings and 44,220 Chapter 7 bankruptcy filings in the Tampa Division. An average of 23 creditors are identified on the schedule of the typical bankruptcy estate. Special Counsel represent half of the trustees in the Tampa Division of the Middle District of Florida. Each high-volume creditor or collector entity makes thousands, if not millions, of consumer contacts a day. Indeed, some creditors and collectors use automated dialers, which are sometimes set up to make as many as 4-8 calls per day per consumer. As a result, approximately half a million potential claims have been available to the clients of Special Counsel over the past four years. In that time frame, Special Counsel's clients have filed roughly 2,494 complaints (some with multiple defendants). Special Counsel have therefore filed as adversary proceedings less than one half of one percent of the potential available claims. R12-11 at 13.

[2] Review of the bankruptcy court's records demonstrates that the consumer protection claims Special Counsel have filed on behalf of bankruptcy trustees have been dismissed for a variety of reasons – as are most civil complaints filed in federal courts. That is, claims are dismissed following appeals, trials, dispositive motions, arbitrations, amendments, settlements, formal and informal discovery, and early review and negotiations. Most claims are dismissed after a settlement – either a settlement in which the parties execute an agreement and the creditor pays or a settlement in which the parties agree to a joint stipulation of

Cadlerock's contention that Special Counsel do not attempt to settle lawsuits before filing them is likewise mistaken.[3]

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dismissal with prejudice, with each party bearing its own fees and costs. Opposing counsel that have regularly entered into such stipulated dismissals include such prominent law firms as Holland and Knight, Broad and Cassel, Carlton Fields, Shutts and Bowen, Burr Forman, Severson Werson, Quarles and Brady, Blank and Rome, Stroock and Stroock and Lavan, and others – none of which have filed sanctions motions with the court. Typically those settlements occur because at an early stage the defendant either recognizes and admits the violation and opts to settle and pay early, or voluntarily provides account notes and call records, which sometimes contradict the debtor's testimony. In those instances in which the defendant provides contrary records and seeks a dismissal, the trustees use their business judgment to evaluate and sometimes opt not to pursue a claim that might prove to be more of a burden on the estate than benefit to it. An extremely small percentage of claims are dismissed in circumstances other than one of the two settlement scenarios described above. In fact, there have been only eleven non-stipulated dismissals filed by Special Counsel for any client over the past four years. Nine of these eleven "straight" dismissals involved a missing, defunct, or bankrupt defendant or a problem with the formal legal name of the defendant – none of which are circumstances in which frivolity should be assumed. That leaves only two cases out of the 2,494 total complaints – two of the eleven "straight" dismissals – that involved a defendant that was unhappy with being sued, demanded to be dismissed, and refused to agree to a joint stipulation for dismissal with each side bearing its own fees and costs. Out of the eleven "straight" dismissals Special Counsel had been involved in over the prior four years, the dismissal of the adversary proceeding in this case was one of those two dismissed for reasons other than a defendant-related issue. R12-11 at 13-15.

[3]The bankruptcy court's records show that a number of both creditor and debt collector defendants participate in a pre-suit review and resolution process. Court records demonstrate Special Counsel have resolved over 371 matters pre-suit over the past four years. Doc. 12-11 at 15.

Following a hearing, R2-79, the bankruptcy court granted Cadlerock's motion to reopen. R2-80. Judge May cautioned Cadlerock, however, that its "laundry list of sanctions" was "beyond the pale." R2-79 at 20.

Cadlerock filed its Motion for Sanctions on August 27, 2015. R2-69. Notwithstanding Special Counsel's refutation of many of Cadlerock's factual assertions and Judge May's cautionary words regarding the sanctions Cadlerock sought, the Motion for Sanctions that Cadlerock filed was identical in all material respects to the proposed Motion for Sanctions Cadlerock had attached as an exhibit to its Motion to Reopen.[4] *Compare* R2-54 *with* R2-69.

Special Counsel responded to Cadlerock's Motion for Sanctions. R12-14. They admitted the errors in the complaint and explained how they occurred, as well as why it was not in bad faith and did not entitle Cadlerock to sanctions under Section 1927 or Section 105(a). *Id.* Further, Special Counsel explained that Cadlerock was not entitled to sanctions due to its own unclean hands. *Id.* at 26-27. Specifically, Cadlerock is neither licensed as a collection agency in Florida, nor even licensed to do business in Florida, making its collection efforts against Mr. Gonzalez unlawful. *Id.* at 1-2. Mr. Cadle and the Cadle entities also

[4]Many of the same refuted assertions are again raised in Cadlerock's appeal.

have a history of unlicensed collection, vexatious litigation,[5] and abusive lawsuits.[6] *Id.* at 1-3.

Mr. Cadle reacted to Special Counsel's response by sending a letter to Special Counsel, their attorney, and every member of their attorney's law firm threatening to sue them and to bankrupt the Trustee and Special Counsel. *See*

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[5]Massachusetts denied Mr. Cadle and his company a license based on findings Cadle illegally initiated collection lawsuits and filed counterclaims seeking recovery of debts it did not own, operated in the state without a license and in violation of state law and a court order, and was the subject of numerous complaints from Massachusetts debtors regarding its debt collection activities. *Cadle Company v. Massachusetts Division of Banks*, 2006 WL 4119647 (Mass. Super. 2006). Additionally "[f]or nearly a decade, Mr. Cadle faced the threat of arrest by authorities in Texas as the result of a lengthy debt collection dispute in which a county court concluded that Mr. Cadle had tried to financially ruin a debtor and used a pattern and practice of abusive lawsuits." *See* Eric Lipton, *No Easy Workout-After the Bank Failure Comes the Debt Collector*, New York Times, April, 16, 2009 at B1; *see also Cadle Company v. Lobingier*, 50 S.W.3d 662 (Tex. 2001) (affirming sanctions and contempt judgment). A review of court dockets reveals that Mr. Cadle and the Cadle entities have repeatedly been involved in vexatious litigation, including but not limited to suing their own attorneys and being sued by their own attorneys for failure to pay. *See The Cadle Company v. Sweet & Brousseau, P.C.*, 2003 WL 222321 (N.D. Tex. 2003); *Hinkle, Cox, Eaton, Coffield & Hensley v. The Cadle Company of Ohio, Inc*., 848 P.2d 1079 (S.C. N.M. 1993); *Reiner, Reiner and Bendett, P.C. v. The Cadle Company*, 897 A.2d 58 (S.C. Conn. 2006).

[6] Mr. Cadle is the founder of an organization known as Citizens Against Corrupt Attorneys ("CACA") that has filed nearly 100 grievances against attorneys across the country, and has stated under oath that in his estimation 10 percent of all attorneys and judges are crooked, deemed the entire judicial system as corrupt, and likened the judges and lawyers in Fort Worth Texas to the mafia. *See* Lisa Siegel, *Suit Against Connecticut Lawyers Prompted By Personal Loathing of the Legal Profession?*, 2005 Conn. L. Trib. ALM Media Properties, LLC, June 6, 2005 at (2005).

R12-21. Further, documents turned over in discovery demonstrated that Cadlerock sought discovery in this matter for the improper purpose of expanding the scope of the litigation beyond that authorized by the bankruptcy court. *See* R2-102 at 4-5; 2-107.

During these proceedings, Cadlerock's General Counsel filed a bar complaint with the Florida Bar against Mr. Lash alleging he had engaged in solicitation. R2-106. The Bar determined there was insufficient evidence to suggest Mr. Lash had violated any disciplinary rule and dismissed the complaint. R2-106.

d. Special Counsel's Motion for Summary Judgment

The parties initiated discovery in September 2015 and conducted extensive discovery over the next nine months. R2-84, R2-142 at 7. In June 2016, Special Counsel moved for summary judgment. R2-142. The motion set forth the undisputed facts established by the record and explained that the undisputed facts showed Cadlerock could not establish entitlement to sanctions under Section 1927 or Section 105(a). *Id.*

In response to the Motion for Summary Judgment, Cadlerock did not identify record evidence to dispute the facts set forth in the motion. R2-155. Instead, it argued on legal grounds that summary judgment was not appropriate, and that the facts established in discovery supported sanctions. *Id.*

e. The Bankruptcy Court's Ruling

Following briefing and the bankruptcy courts' review of the record and pleadings, and after hearing oral argument, the bankruptcy court granted Special Counsel's Motion for Summary Judgment and denied Cadlerock's Motion for Sanctions. R2-2. The bankruptcy court held that there was "no showing that Special Counsel knowingly or recklessly filed a frivolous claim." *Id.* at 4. The judge noted that there was no evidence the claim against Cadlerock was filed for purposes of harassment and not "a whiff of abuse of process." *Id.* at 5, 6.

The bankruptcy court exercised its discretion to deny sanctions against the Trustee or Special Counsel under Section 105, stating that it did not believe such sanctions are appropriate under the circumstances of this case. *Id.* at 6-7. The Court explained that if it believed the Trustee and Special Counsel had engaged in wrongdoing, endangered the public, or made a mockery of the Court's processes, it would impose sanctions, but it did not find such conduct existed here. *Id.* at 7.

The bankruptcy court further held that Section 1927 sanctions were unwarranted and exercised its discretion to deny such sanctions. R2-2 at 8. It noted that Cadlerock had delayed almost eleven months after the dismissal of the adversary proceeding against it to seek sanctions, and that the relief it sought was excessive. *Id.* at 7. It held that the Trustee and Special Counsel had not engaged

in unreasonable or vexatious conduct, and had not multiplied the proceedings, but rather promptly dismissed the complaint against Cadlerock within the Rule 9011 safe harbor time period. *Id.* In this regard, the court noted that the adversary proceeding had consisted of ten docket entries, only three of which were substantive. *Id.* Thus far, Cadlerock's sanctions litigation has spanned from November 2014 to the present. R12-2. Cadlerock's sanctions litigation has resulted in at least 261 docket entries in the bankruptcy court alone. *Id.*

B. Facts regarding the bankruptcy court's discovery rulings

Shortly after filing its Motion for Sanctions, Cadlerock propounded discovery requests on Special Counsel, sought deposition dates for multiple witnesses, and notified Special Counsel it intended to serve subpoenas on third parties. R2-85, 2-88-92. The discovery requests were extensive, with the Requests to Produce, for example, containing 63 requests that encompassed essentially every document in Special Counsel's possession relating to every adversary proceeding Special Counsel filed on behalf of any bankruptcy trustee from January 2010 on; all documents, including names, addresses, paystubs, and time records, relating to numerous employees of the Lash & Wilcox law firm; and all documents relating to the Lash & Wilcox law firm's internal procedures and form complaints. R2-89. The proposed subpoenas to third parties would have required those parties to produce all documents regarding any adversary

proceedings Special Counsel had filed against them from January 2010 on. R2-91, 2-92.

The bankruptcy court granted Special Counsel's motion in part and denied it in part. R2-101. Special Counsel then filed a motion for reconsideration. R2-102. Following argument on the motion for reconsideration, the bankruptcy court held that discovery would be conducted in two phases. R2-115. The first phase would pertain to the issues related to Cadlerock's case, such as the Gonzalez account, collection on the Gonzalez account, the basis for the adversary proceeding against Cadlerock, and the adversary proceeding. *Id.* The bankruptcy court held that Cadlerock would be entitled to discovery regarding adversary proceedings against other defendants in the second phase of discovery, if it established as a threshold issue that the adversary proceeding against it violated Section 105 or Section 1927. *Id.*

Cadlerock served subpoenas for video recorded depositions. R2-118. Special Counsel did not object to video recording of depositions, but moved for a protective order to ensure that the video recordings were not used for any improper purpose, such as posting on the Internet, sharing them with third parties, or using them for other purposes or cases. *Id.* Following a hearing, the bankruptcy court granted the motion, ordering that deposition video recordings

or transcripts could not be disseminated to third parties or posted on the internet without prior permission from the bankruptcy court. R2-134.

C. Facts regarding Cadlerock's Motion to Recuse

The same day Cadlerock filed its Second Motion to Reopen, it filed a Motion to Recuse Judge May.[7] R2-53. The motion was based on assertions that Judge May denied Cadlerock's first Motion to Reopen, the Trustee and Special Counsel have appeared before Judge May in numerous cases, and Judge May appointed Ms. Herendeen as Trustee and appointed Special Counsel. *Id.*

At the hearing on the Motion to Recuse, Cadlerock conceded that the Bankruptcy Court does not appoint bankruptcy trustees and did not appoint Ms. Herendeen. R2-79 at 5. Judge May pointed out that he also has no role in selecting professionals to be employed by bankruptcy estates, other than approving the trustee's selection of a professional. *Id.* at 5-6. Judge May denied Cadlerock's Motion to Recuse. R2-81.

Cadlerock appealed the denial of its Motion to Recuse to the district court. R2-82; 2-83. That appeal was also dismissed for lack of jurisdiction. Case No. 8:12-bk-192130-KRM, Doc. 200.

[7] Cadle entities have previously filed frivolous motions to recuse. *See Cadle Co. v. Lobingier*, 2003 WL 21525417 (Tex. App. 2003) (denying motion by Mr. Cadle and the Cadle Company to recuse all justices in appellate court).

SUMMARY OF THE ARGUMENT

The bankruptcy court's rulings should be affirmed in all respects because Cadlerock cannot meet the high burden of demonstrating that the bankruptcy court abused its discretion. The bankruptcy court properly held based on an extensive, well-developed record, that sanctions are not warranted under Section 105 or 1927. The bankruptcy court's discovery orders were an appropriate exercise of the court's authority to regulate discovery. Finally, Judge May did not abuse his discretion in determining that recusal is neither necessary nor appropriate here.

ARGUMENT

I. The bankruptcy court did not abuse its discretion by granting summary judgment and denying Cadlerock's Motion for Sanctions.

In response to the filing of a single adversary complaint that was dismissed with prejudice less than a month and a half after it was filed, within the Rule 9011 safe harbor time period, Cadlerock has engaged in an extensive and vindictive campaign of litigation that has now lasted over two years. In contrast to the ten docket entries the original proceeding resulted in, Cadlerock's litigation has resulted in hundreds of docket entries in the bankruptcy court alone, and Cadlerock is now on its fifth appeal. Cadlerock has employed discovery tactics designed to disrupt the operations of the law firm, and has repeatedly attempted to expand the scope of discovery beyond that authorized by the bankruptcy court. The litigation has been extremely expensive for Special Counsel,[8] and the manner in which Cadlerock has conducted it appears designed to harass Special Counsel and the Trustee and intimidate them from filing consumer protection claims.

Against that backdrop, the bankruptcy court afforded Cadlerock more than sufficient opportunity to demonstrate the Trustee and Special Counsel had acted

[8]As of July 2016 – before this appeal – Special Counsel had already expended approximately $330,000 in attorney time and costs in responding to Cadlerock's litigation. Case No. 8:12-bk-19213-KRM (Bankr. M.D. Fla.), Doc. 247, 248, 249.

in bad faith, behaved recklessly or unreasonably, or engaged in vexatious litigation. It failed to do so.

The bankruptcy court Order granting summary judgment and denying Cadlerock's Motion for Sanctions following the conclusion of extensive discovery was within its discretion. The bankruptcy court had an extensive factual record before it, along with briefing and oral argument, and it was well aware of the relevant facts and legal principles. In an exercise of its discretion, the bankruptcy court decided that sanctions are not warranted here. None of Cadlerock's appellate arguments provide a basis on which to disturb the bankruptcy court's ruling.

A. The bankruptcy court properly denied Cadlerock's Motion for Sanctions without an evidentiary hearing.

Following the conclusion of nine months of discovery, Special Counsel presented the bankruptcy court with extensive evidence demonstrating Cadlerock's lack of entitlement to sanctions. R2-142-152. Cadlerock had an opportunity to respond and present additional evidence to the bankruptcy court, and did so. R2-154-156. The bankruptcy court considered all of those facts in deciding the motion for summary judgment and motion for sanctions. R2-2 at 2.

Cadlerock argues, however, that the bankruptcy court lacked the authority to decide its motion for sanctions on summary judgment without an evidentiary

hearing. IB27-28. To the contrary, the bankruptcy court was not required to hold an evidentiary hearing on Cadlerock's motion and properly decided the matter on summary judgment.

Citing no authority, Cadlerock asserts that the summary judgment procedure may only be used for the entry of judgment on the pleadings, and not for the resolution of any motion, and a motion for sanctions in particular. IB27-28. To the contrary, bankruptcy courts are permitted to summarily rule on virtually any issue, including but not limited to motions for violation of automatic stay, *In re Myers*, 402 B.R. 370 (M.D. Ala. 2009); to void preferential transfer, *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F. 2d 1199 (9th Cir. 1974); or for discharge injunction violation, *In re Al-Jiboury*, 344 B.R. 218 (D. Mass. 2006). Further, a federal court "has the discretion, but is not required, to hold an evidentiary hearing" before deciding a sanctions motion. *Lambright v. Ryan*, 698 F.3d 808, 825-26 (9th Cir. 2012). The denial of an evidentiary hearing on a sanctions motion is not an abuse of discretion where there were no disputed issues of material fact and parties had the opportunity to brief the sanctions issue, *id.*, as the parties unquestionably did here.

The bankruptcy court acted within its discretion by deciding Cadlerock's sanctions motion on summary judgment without an evidentiary hearing.

B. The law of the case doctrine did not require the bankruptcy court to impose sanctions.

Cadlerock next argues that the law of the case doctrine precluded the bankruptcy court's decision. IB29-31. Pursuant to this doctrine, "an appellate court's decision of a legal issue must be followed in all subsequent trial or intermediate appellate proceedings in the same case, unless" among other things, "a subsequent trial produces substantially different evidence." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1003 n. 7 (11th Cir. 1997). The doctrine applies only if "the issue contested on the latter appeal" is "the same issue that was contested on and decided by the former appeal." *Id.* The law of the case doctrine did not preclude the bankruptcy court from granting summary judgment and denying Cadlerock's motion for sanctions for at least three reasons.

First, the issues decided in the prior appeal and by the bankruptcy court were different. The prior appeal in this case was of the denial of Cadlerock's first Motion to Reopen to file a class action lawsuit. R2-51. In that appeal, the Court noted that Section 105 authorized sanctions based on bad faith. *Id.* at 9. It stated that if Cadlerock had requested that the bankruptcy court reopen the case to seek Section 105 sanctions, the denial of the motion to reopen might have been an abuse of discretion. *Id.* at 10. The Court described Cadlerock's allegations as "troublesome," and stated that if they had been "properly raised," they "would

have warranted consideration by the Bankruptcy Court." *Id.* The Court also addressed Special Counsel's assertion that Cadlerock's proposed complaint was collaterally estopped because Cadlerock has failed to timely seek sanctions in the bankruptcy case, stating that this argument "neglects to take into account the substance of [Cadlerock's] allegations" that "it was not until the months after the case was closed that [Cadlerock] was able to discover the facts that spurred it into action." *Id.* at 9 n. 3. The language Cadlerock relies on from the prior appeal thus addressed whether Cadlerock should be permitted to have the case reopened to file a motion for sanctions, not whether the bankruptcy court would be required to hold an evidentiary hearing on that motion or grant the motion.

Second, the bankruptcy court's ruling was consistent with the Court's comments in the prior appeal. The implication of those comments was that Cadlerock's allegations merited the bankruptcy court's consideration and would be a basis to reopen the case to file a motion for sanctions. R2-51 at 9-10. The bankruptcy court granted Cadlerock's motion to reopen and allowed it to file a motion for sanctions. It then permitted extensive discovery on the motion, and after careful consideration, determined that sanctions were not warranted. R2-2. That is, the bankruptcy court acted precisely as the Court recommended.

Third, the facts before the bankruptcy court were substantially different than those before the district court. In this regard, it is worth noting that in both

the bankruptcy court and on appeal, Cadlerock has made numerous allegations that were based on untruths, half truths, and innuendo. The Court predicated its comments on appeal on Cadlerock's representation to the Court that Cadlerock did not learn of the facts that caused it to take action "until several months after the case had been closed." R2-51 at 9 n. 3. To the contrary, as discussed above Statement of Facts Section III.A.1.g, Cadlerock was aware of the facts it relied on in support of its proposed class action and its Motion for Sanctions well before the bankruptcy case was closed. Cadlerock made a deliberate decision not to seek fees or sanctions while the case was open because it had not decided whether to file a RICO class action lawsuit. R2-144 at 93-94, 104, 147. Further, the facts set forth in the prior appeal were merely Cadlerock's allegations, while the bankruptcy court made its decision based on a factual record developed after extensive discovery.

For all of these reasons, the law of the case doctrine did not preclude the bankruptcy court's ruling.

C. The bankruptcy court's decision did not rest on Cadlerock's unclean hands.

Special Counsel presented considerable evidence to the bankruptcy court that Cadlerock was not entitled to sanctions because it had unclean hands. Doc. R2-142 at 27-30; R12-14 at 26-27. The bankruptcy court, however, expressly

declined to decide that issue, stating the resolution of the issue was not necessary to deciding the summary judgment motion. R2-2 at 6. Accordingly, Cadlerock's arguments regarding whether the evidence of its unclean hands could properly be considered by the bankruptcy court in deciding the motions before it, IB37-43, are irrelevant. The bankruptcy court did not consider that evidence.

The bankruptcy court commented that the Special Counsel's argument that Cadlerock sought to impose a "double standard" on it had "tangential bearing on the issues before" it. R2-2 at 6. That is, Cadlerock argued in the bankruptcy court, as it does before this Court, IB40, that the sworn 341 testimony that Special Counsel rely on in filing consumer protection complaints is an inadequate basis to file a lawsuit. Cadlerock's representative testified that the company did not investigate the accuracy of the payment history a third party provided it, otherwise investigate the validity or enforceability of the debt, or obtain sworn testimony supporting the information it relied on in suing Mr. Gonzalez, R2-144 at 37-38, 61; *see also* R2-143 at 24, despite the existence of numerous red flags that would have caused a cautious litigant to inquire further. Given that, as discussed above, the bankruptcy court was required to apply an objective standard in evaluating the reasonableness of Special Counsel's conduct, it was not unreasonable for the bankruptcy court to take notice of the looser standard Cadlerock imposed on itself in initiating litigation.

D. The bankruptcy court properly exercised its discretion not to impose sanctions.

Cadlerock further argues that the bankruptcy court's order should be reversed on the theory that controlling case law authorized the imposition of sanctions here under Section 105 or 1927. IB31-37. The flaw in Cadlerock's argument is that the bankruptcy court recognized its authority to impose sanctions under both of the cited statutes. Indeed, the bankruptcy court commented that it was "very protective of the Court and its processes," has previously imposed sanctions, and would do so if it deemed them appropriate. R2-2 at 7. However, recognizing its authority to impose sanctions, the bankruptcy court exercised its discretion not to do so because it did not believe they were appropriate on the facts of this case. *Id.* at 6-8.

While, as Cadlerock recognizes, the sanctions it requested require a finding of bad faith, IB32-35, the bankruptcy court did not find that Special Counsel or the Trustee acted in bad faith or knowingly or recklessly filed a frivolous claim. R2-2 at 4. Cadlerock suggests it was an abuse of discretion for the bankruptcy court to decide this issue without an evidentiary hearing because an attorney's bad faith is evaluated based on an objective standard rather than a subjective standard. IB 35 (citing *Amlong*, 500 F. 3d at 1240). The principle Cadlerock relies on does not help it. As the Supreme Court has recognized, the application

of an objective standard allows claims to be decided on summary judgment. *See*, *e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998).

Finally, Cadlerock argues that the bankruptcy court should not have granted summary judgment and denied Cadlerock's motion for sanctions because of what Cadlerock characterizes as disputed fact issues. IB 43-58. In making this argument, Cadlerock overlooks both the summary judgment standard and the standard for deciding a motion for sanctions. That is, the bankruptcy court was required to deny summary judgment only if there was a *material* fact dispute, that is, one "that might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The decision whether to grant a sanctions motion under Section 105 or Section 1927 is committed to the discretion of the bankruptcy court. *Adams v. Austal, U.S.A., L.L.C.*, 569 Fed. Appx. 728, 731 (11th Cir. 2014); *In re O'Lone*, 405 Fed. Appx 413, 414 (11th Cir. 2010).

It was well within the discretion of the bankruptcy court to determine what facts or potentially disputed facts it deemed material in deciding whether Cadlerock was entitled to sanctions. Indeed, a court may properly decide a sanctions issue on the papers or it can take judicial notice of the record and issue its ruling; a party seeking sanctions is not entitled to a trial, evidentiary hearing, or even a preliminary hearing. *See Martin v. Giordano*, 2016 WL 2731473, at

*24-25 (E.D. N.Y. 2016). Further, while the court here applied a summary judgment standard, a court is not required to apply the that standard in deciding a sanctions motion. *Mathews v. Moss*, 2011 WL 13134350, *3 (S.D. Fla. 2011), *aff'd*, 506 Fed. Appx. 981 (11th Cir. 2013). Additionally, the party against whom sanctions are sought is entitled to due process; the same does not apply to the party requesting sanctions, and hearings may not be necessary if there is an opportunity to respond, a record, or the judge deciding the motion presided over the litigation and is aware of the facts and procedure. *See Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987); *INVST Financial Group, Inc. v. Chem–Nuclear Systems, Inc.*, 815 F.2d 391, 405 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987); *In re Kunstler*, 914 F.2d 505, 521-22 (4th Cir. 1990).

Here, Special Counsel provided the Court with a comprehensive review of the facts relating to all stages of the proceeding. R2-142 at 1-25. Cadlerock likewise provided the bankruptcy court with a recitation of what it believed were the relevant and disputed facts, including all of those identified in its appellate brief. R2-155 at 13-24. The bankruptcy court expressly took all of those matters into account in deciding the Motion for Summary Judgment and Motion for Sanctions. R2-2 at 2. Having done so, the bankruptcy court exercised its discretion to hold that sanctions are not warranted here under Section 105 or

Section 1927. R2-2 at 6-8. Cadlerock has not identified anything that renders the bankruptcy court's decision an abuse of discretion.

For example, Cadlerock argues that the debtor's responses to the questionnaire contradicted his 341 testimony, and criticizes Special Counsel's reliance on the 341 testimony without further investigation. IB49-52. The bankruptcy court, however, had before it Special Counsel's testimony regarding why Special Counsel rely on sworn 341 hearing testimony rather than the debtor's unsworn responses. R2-148 at 110. The bankruptcy court expressly held that "[w]hile the debtor's questionnaire may have been inconsistent with [his 341 hearing testimony], relying on debtor's the sworn testimony rather than the unsworn questionnaire is not negligence, malpractice, or bad faith." R2-2 at 4.

Similarly, the bankruptcy court addressed Cadlerock's allegation that Special Counsel are engaged in solicitation and rejected it, based on both the fact that the Florida Bar dismissed Cadlerock's bar complaint of solicitation and because Florida's solicitation rule provides "a safe harbor where there is a preexisting relationship between counsel and a potential client," and Special Counsel and the Trustee had a relationship that preceded this case. R2-2 at 5. The bankruptcy court further noted that although the underlying claim may have originated with the debtor, the Trustee and not the debtor is the client. *Id.* The bankruptcy court therefore rejected Cadlerock's argument Special Counsel had

improperly engaged in solicitation. *Id.* at 6. Cadlerock argues the bankruptcy court misunderstood the Florida Bar's letter dismissing its Bar complaint. IB56-57. To the contrary, the Bar's letter expressly states that the Bar had considered the "facts and available evidence" and concluded that there was "insufficient evidence" to conclude Special Counsel had violated any attorney disciplinary rule. R2-152. The evidence Cadlerock provided the Bar included all filings to that date in this matter. Cadlerock also takes issue with the bankruptcy's court's resolution of the solicitation issue based on the principle that a bankruptcy trustee stands in the shoes of the debtor. IB55-56 (citing *O'Halloran v. First Union Nat. Bank of Florida*, 350 F.3d 1197, 1202 (11th Cir. 2003)). The case Cadlerock cites, however, has nothing to do with the solicitation rule, but with the issue of the trustee's standing to assert a claim. Cadlerock cites no authority supporting its contention that Special Counsel's conduct is solicitation, much less that provides any basis for the conclusion that the bankruptcy court's holding that Special Counsel are not engaged in solicitation is "a clear error of judgment" or the application of "the wrong legal standard," as would be required to find that the bankruptcy court abused its discretion. *In re O'Lone*, 405 Fed. Appx at 414.

For these reasons, Cadlerock has not and cannot establish that the bankruptcy court abused its discretion by granting Special Counsel's Motion for Summary Judgment and denying Cadlerock's Motion for Sanctions.

II. The Bankruptcy Court properly exercised its discretion to regulate discovery.

On appeal, Cadlerock raises two discovery issues: (1) the order bifurcating discovery; and (2) the restriction on the use of video recordings of depositions. Bankruptcy courts possess wide latitude to regulate discovery. Federal Rule of Civil Procedure 26(b)(2), made applicable to bankruptcy courts by Federal Rule of Bankruptcy Procedure 7026, provides courts wide latitude to limit frequency or extent of otherwise permissible discovery. Moreover, Rule 26(c) allows courts to enter orders necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including that discovery not be had or be had only by a method other than that selected by the party seeking discovery. *See also In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69–70 (2d Cir. 2003). Here, the bankruptcy court permitted extensive discovery, and made rulings in favor of and against both Special Counsel and Cadlerock. R2-101, 2-115, 2-132, 2-134, 2-140, 2-141. Cadlerock has failed to establish that either of the discovery rulings it appeals was an abuse of discretion.

A. The bankruptcy court appropriately required Cadlerock to establish bad faith in its own case before obtaining discovery regarding other proceedings.

Cadlerock first argues that the bankruptcy court's decision to initially limit discovery to the facts surrounding the adversary proceeding against Cadlerock was error because a trial court is permitted to consider other misconduct in deciding a sanctions motion. IB58-60. To the contrary, the bankruptcy court neither refused to consider unrelated proceedings nor denied Cadlerock an opportunity to obtain discovery about such proceedings. Instead, it held that before Cadlerock would be allowed to seek discovery regarding other lawsuits it had to establish as a threshold matter that the adversary proceeding against it violated Section 1927 or Section 105. R2-115 at 2.

The limitation the bankruptcy court imposed was a reasonable one that allowed discovery to proceed in an orderly and proportionate fashion. The discovery Cadlerock sought regarding other cases would have required Special Counsel to produce virtually every document in the firm going back to its inception, including but not limited to every document in every case, and would have raised attorney-client privilege, work product doctrine, and confidentiality issues. Doc. 2-89. Even the discovery Cadlerock was allowed to take was expensive and disruptive to the law firm's operations. The bankruptcy court evaluated the burden resolving the related discovery issues and responding to

Cadlerock's discovery requests would imposed on Special Counsel and the Court and placed an appropriate limit. Cadlerock was ultimately unable to obtain discovery regarding other matters, not because of the bankruptcy court's discovery rulings, but because it could not establish bad faith in its own case.

The bankruptcy court's decision to bifurcate discovery was not an abuse of discretion.

B. The bankruptcy court appropriately limited the use of video recordings of depositions.

The bankruptcy court's ruling regarding the use of video depositions was similarly measured and appropriate. The Court allowed Cadlerock to take video recorded depositions and allowed the depositions to be used in this case. The discovery order merely prevented any party from posting the video recordings on the internet or sharing them with third parties and ordered that if any party wished to use a deposition video or transcript it could seek permission from the court to do so. Numerous courts have recognized the appropriateness of precisely such limitations. *See Shultz v. Dart*, 2015 WL 4934552 (N.D. Ill. 2015); *Lopez v. CSX Trans*., 2015 WL 3756343 (W.D. Penn. 2015); *Springs v. Ally Fin., Inc*., 2014 WL 7778947 (W.D.N.C. 2014); *Barket v. Clark*, 2013 WL 647507 (D. Nev. 2013); *Larson v. Am. Fam. Mut., Ins., Co*., 2007 WL 622214 (D. Colo. 2007);

Stern v. Cosby, 529 F.Supp.2d 417 (S.D.N.Y. 2007); *Forest v. Citi Res. Lending, Inc*., 73 So.3d 269 (2d DCA Fla 2011).

To the extent Cadlerock complains on appeal that its use of deposition transcripts is restricted, that issue is moot, as the bankruptcy court declined to seal deposition transcripts, R2-134 at 2, and the deposition transcripts have been filed in the court record. 2-144-50, 2-156. Cadlerock's only complaint at this point could be that it seeks to use video recordings of depositions for purposes such as posting them on the internet or disseminating them to third parties. If Cadlerock has a legitimate reason to use the video recordings, however, the bankruptcy court's order allowed it to seek the court's permission to do so. R2-134 at 2. The fact that it has nonetheless appealed to have all restrictions on its use of those recordings lifted suggests that Special Counsel's concern that Cadlerock seeks to use those recordings in a continued attempt to harass, intimidate, and smear the Trustee and Special Counsel is well-founded.

Finally, the proposition of law Cadlerock cites in support of its argument, that "embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records," IB67 – is not relevant here and reflects Cadlerock's confusion regarding the standard for a protective order regarding discovery information and the much more stringent standard for sealing court records. As the *Larsen* court stated:

> The United States Supreme Court has held that discovery is for the "sole purpose of assisting in the preparation and trial of litigated disputes" and that "pretrial depositions and interrogatories are not public components of a civil trial." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). The proper standard, therefore, is the good cause standard delineated in Rule 26. *See id.* It is within the sound discretion of this Court to determine whether a protective order is appropriate to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

2007 WL 622214 at *1. Applying that standard to the case before it, the *Larsen* court observed that "A videotaped deposition is, by nature, information that would not otherwise be obtained by opposing counsel, absent this litigation. It is, therefore, appropriate that such information be limited to use in this lawsuit, if the Defendant can establish that other uses will subject the deponents to annoyance, harassment, and embarrassment." *Id.*

The bankruptcy court's decision to limit the uses of video recordings of depositions was reasonable, contemplated the potential for abuse, danger, and embarrassment of improper dissemination of videos, and was not an abuse of discretion.

III. The Bankruptcy Court properly exercised its discretion not to recuse itself.

Judge May acted well within his substantial discretion when he denied Cadlerock's motion to recuse. There is no reasonable basis on which his

impartiality could be questioned. The federal recusal statute requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Recusal under this statute "turns on whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *In re Moody*, 755 F.3d 891, 894 (11th Cir. 2013). A judge "should not recuse himself on unsupported, irrational, or highly tenuous speculation." *Id.* "The standard for recusal based on a claim of lack of impartiality is objective reasonableness," *In re Evergreen Security, Ltd*., 363 B.R. 267, 295 (Bkrtcy. M.D. Fla. 2007), and the Court is not required to accept the movant's factual statements as true. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988). A recusal motion based on "[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" or "prior rulings in the proceeding, or another proceeding, solely because they were adverse" does not satisfy the requirements for disqualification. *United States v. Cooley*, 1 F.3d 985, 993–94 (10th Cir. 1993). "To hold otherwise would transform recusal motions into tactical weapons which [litigants] could trigger by manipulating the gossamer strands of speculation and surmise." *In re United States*, 158 F.3d 26, 35 (1st Cir. 1998).

The decision whether to recuse is within the sound discretion of the judge being asked to recuse. *See In re Bernard,* 31 F.3d 842, 843 (9th Cir. 1994). Judges have a duty to not recuse on unsupported speculation. *Willner v. University of Kansas*, 848 F.2d 1023, 1027 (10th Cir. 1988). "The grounds for a judicial recusal must be of a character to seriously impair the Court's impartiality and so clearly obvious and sufficient enough to overcome the presumption of the Court's integrity." *In re Pritchard & Baird, Inc*., 16 B.R. 16, 19 (Bkrtcy .D.N.J. 1981). Here, Cadlerock's allegations are nothing but speculation and there is no basis sufficient to overcome the presumption of Judge May's integrity. Equally important, any alleged bias must be extrajudicial to require recusal. *In re Whet, Inc*., 33 B.R. 424, 428 (Bkrtcy. D. Mass. 1983). The grounds Cadlerock provided for recusal are purely judicial; none are extrajudicial.

The grounds on which Cadlerock argues Judge May should have recused himself do not come close to constituting a sufficient basis for recusal. Cadlerock argues on appeal that Judge May should have recused himself because the Trustee and Special Counsel regularly appear before him, Judge May approves Special Counsel's employment by the Trustee, and Judge May has previously ruled against Cadlerock. IB60-62. None of these assertions would persuade an objective observer that Judge May is not impartial. Further, Cadlerock's Motion to Recuse was untimely.

A. The Trustee and Special Counsel's regular appearances before Judge May do not require recusal.

The primary basis on which Cadlerock argues Judge May should have recused himself is that the Trustee has appeared before him in numerous bankruptcy cases and adversary proceedings and has authorized the Trustee to retain Special Counsel many times. IB63. According to Cadlerock, the Bankruptcy Court's familiarity with the Trustee and Special Counsel creates an appearance of impropriety that requires recusal. *Id*.

Cadlerock cites no authority holding that a court's familiarity with or appointment of counsel requires recusal. Federal cases have held to the contrary. *See, e.g., In re Linerboard Antitrust Litig.*, 361 Fed. App'x 392, 401 (3d Cir. 2010); *Farkas v. Ellis*, 768 F. Supp. 476, 479-80 (S.D.N.Y. 1991).

In this case, no objective person could question Judge May's objectivity based on Cadlerock's allegations. Indeed, Cadlerock's assertions do not even rise to the level of those in *Linerboard* or *Farkas* because Judge May did not appoint the Trustee or select Special Counsel. Judge May has a purely professional relationship with them, as he does with any of the bankruptcy trustees or professionals who appear before him. Judge May has no interest in the outcome of this case beyond the interest any judicial officer has in correctly deciding the case before him.

Cadlerock is thus left to complain about Judge May's "familiarity" with the Trustee and Special Counsel because they appear before him regularly. IB63. If Cadlerock's purported basis for recusal were valid, then no trustee and no special counsel would ever be able to appear in front of a bankruptcy court in this Division or District or any other. It is normal and customary in every bankruptcy court in the country for the judges to work with the relatively small bar that is the creditor, debtor, and trustee bankruptcy bar. Each district has a finite number of trustees and bankruptcy judges, which requires them to work together consistently and regularly. If Cadlerock's argument were accepted as grounds for recusal, no bankruptcy judge would be able to survive a recusal motion.

Similarly, if Cadlerock's rule were adopted no district court would be able to hear criminal cases in which it was necessary to appoint counsel under the Criminal Justice Act. Indeed, the federal courts would be unable to consider virtually any criminal case, in that each district's Assistant United States Attorneys and Assistant Public Defenders frequently appear before the same group of judges. Nor would the federal courts be able to handle class action, shareholder derivative, or multi-district litigation cases in which it is the court's responsibility to select or approve lead counsel. Under Cadlerock's narrow and unreasonable proposed standard, it would be impossible for any judge to be

"impartial," and all judges would have to recuse themselves. This is an absurd result.

Cadlerock failed to present facts that would cause a reasonable observer informed of all the circumstances to question the Bankruptcy Court's impartiality. No basis for recusal existed; under these circumstances the Bankruptcy Court was duty-bound not to recuse itself based on innuendo and speculation. *See Moody,* 755 F.3d at 895. The Bankruptcy Court therefore acted well within its discretion by denying Cadlerock's Motion to Recuse.

B. The Bankruptcy Court's prior rulings against Cadlerock do not require recusal.

Cadlerock further suggests that Judge May's prior rulings in this case required recusal. IB60-64. In particular, Cadlerock points to the Bankruptcy Court's denial of its first Motion to Reopen and the Court's comments in the appeal of that ruling. Cadlerock's argument flies in the face of the well-established rule that a judge's adverse rulings "are not valid grounds for recusal." *Loranger v. Stierheim*, 10 F.3d 776, 780 (11th Cir. 1994). Moreover, the Order denying Cadlerock's Motion to Reopen was not only not evidence of bias, but correct. The Court affirmed that order on appeal because "the Bankruptcy Court properly concluded that" the defenses Special Counsel had asserted "were dispositive of [Cadlerock's] proposed claims." R2-51 at 7.

Cadlerock also suggests the Court's concerns regarding solicitation demonstrate Judge May's bias. IB60-64. Judge May expressly addressed the solicitation issue, relying on both the evidence developed through discovery regarding the practices of Special Counsel and the Trustee and on the Florida Bar's dismissal of Cadlerock's solicitation complaint. R2-2. That Judge May's rulings on the issue was adverse to Cadlerock in no way supports recusal.

C. Cadlerock's Motion to Recuse was untimely.

Finally, the tardiness of Cadlerock's Motion to Recuse would itself have been sufficient grounds to deny the motion. "A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known." *United States v. Siegelman*, 640 F.3d 1159, 1188 (11th Cir. 2011). "The untimeliness of such a motion is itself a basis upon which to deny it." *Id.* Requiring a prompt motion avoids the risk of a party holding back a recusal motion as a fallback position in the event of adverse rulings. *LoCascio v. United States*, 473 F.3d 493, 497-98 (2d Cir. 2007); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986).

Here, Cadlerock's Motion to Recuse was not timely filed. Cadlerock knew at the latest by the time it filed its initial Motion to Reopen and Motion for Leave to Sue in November 2014 that the Trustee and Special Counsel regularly appeared before the bankruptcy court; indeed, the basis of Cadlerock's proposed class

action complaint against the Trustee and Special Counsel was in part their filing of numerous adversary proceedings in the Middle District of Florida Bankruptcy Court over a span of years. R2-20. Despite having this knowledge, Cadlerock did not seek Judge May's recusal at that point. Instead, it waited until more than eight months later – after Judge May had already ruled against it – to file its Motion to Recuse in July 2015. R2-53.

The sequence of events suggests that Cadlerock's Motion to Recuse was filed in response to the bankruptcy court's adverse rulings. In short, Cadlerock was attempting to forum shop, a purpose the federal courts are cautioned against permitting. *See United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993); *In re Parr*, 13 B.R. 1010, 1018 (E.D. N.Y. 1981).

Accordingly, Cadlerock's Motion to Recuse was untimely filed. Its untimeliness alone was sufficient reason to deny it.

CONCLUSION

For these reasons, the bankruptcy court's orders should be affirmed.

Dated: January 6, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response and Answer Brief complies with Rule 8015 of the Federal Rules of Bankruptcy Procedure.

/s/ *Katherine Earle Yanes*
KATHERINE E. YANES, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 6, 2017, I presented a true and correct copy of the foregoing *Appellee's Response and Answer Brief* to the Clerk of the United States District Court for the Middle District of Florida, Tampa Division, for filing and uploading to the CM/ECF system. I further certify that on January 6, 2017, a true and correct copy was served to: Counsel for Appellant, David S. Maglich, Esq., Fergeson, Skipper, et. al., Sarasota, FL 34236-6756 via e-mail (dmaglich@fergesonskipper.com).

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