

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re:

JOHN A. DEEP,

Debtor.

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Chapter 13

Case No. 05-10040

APPEARANCES:

JOHN A. DEEP

Debtor *Pro Se*

26 Roosevelt Blvd.

Cohoes, New York 12047

GEORGE F. CARPINELLO, ESQ.

Attorney for Boies, Schiller & Flexner LLP

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TERENCE J. DEVINE, ESQ.

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Legal Scientific Analysis Group

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ANDREA E. CELLI, ESQ.

Standing Chapter 13 Trustee

350 Northern Blvd.

Albany, NY 12204

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

## MEMORANDUM-DECISION & ORDER

Currently before the court is the motion by the debtor, John A. Deep, pro se, seeking recusal of the court from further participation in his bankruptcy case and all related proceedings pursuant to 28 U.S.C. § 455. The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(A) and 1334(b).

On September 26, 2006, Mr. Deep filed a letter requesting that the court *sua sponte* recuse itself from his case. (No. 104.) The court informed Mr. Deep in writing that this request would have to be made by motion pursuant to Local Rule 9013-1 (Motion Practice).<sup>1</sup> (No. 104.) Mr. Deep filed his Motion for Recusal on September 29, 2006. (No. 106.) At the hearing on October 12, 2006, the court informed the parties that it would issue a written decision and asked if anyone wished to supplement their pleadings with oral argument. The parties declined, informing the court that they would rest on their papers. The matter was then considered fully submitted.

### FACTS

Much litigation between the parties has ensued from Mr. Deep's bankruptcy case, but the history of litigation between the parties predates Mr. Deep's bankruptcy filings. In November 2001, the Judicial Panel for Multi-District Litigation ("MDL Court") consolidated in the District Court for the Northern District of Illinois eleven separate actions filed by or against Mr. Deep, AbovePeer, Inc., and BuddyUSA, Inc. Mr. Deep founded BuddyUSA, Inc. to develop the software behind Aimster, a file sharing service, and AbovePeer, Inc. to operate the system. Most

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<sup>1</sup> All references herein to a Local Bankruptcy Rule refer to the Local Bankruptcy Rules for the Northern District of New York unless otherwise specified.

of the actions involved allegations by the recording and music industry of copyright infringement through the use of the Aimster system. One month later, certain copyright owner creditors moved for a preliminary injunction in the MDL Court against Mr. Deep, AbovePeer, Inc., and BuddyUSA, Inc. In response, Mr. Deep filed the first of three chapter 13 bankruptcy cases on March 11, 2002 (Case No. 02-11552). Mr. Deep initially was represented by Boies, Schiller & Flexner, LLP with respect to the MDL litigation. At some point during the MDL litigation in Illinois, the court found good cause for the withdrawal of Boies, Schiller & Flexner, LLP from representing Mr. Deep, and Mr. Deep proceeded pro se.

During his first bankruptcy case, the court granted the Copyright Owner Creditors<sup>2</sup> relief from the automatic stay to pursue their motion for a preliminary injunction against Mr. Deep, AbovePeer, Inc., and BuddyUSA, Inc.'s operation of the Aimster system. On September 4, 2002, the MDL Court granted their request, *In re Aimster Copyright Litigation*, 252 F.Supp.2d 634 (N.D. Ill. 2002). On December 20, 2002, the MDL Court found Mr. Deep in contempt of its preliminary injunction. By order dated April 15, 2003, the MDL Court directed Mr. Deep to pay attorneys' fees and costs of \$103,850.54 and sanctioned him \$5,000 as a result of his violation of the preliminary injunction. Both MDL Court orders were affirmed by the Seventh Circuit Court of Appeals, *In re Aimster Copyright Litigation*, 334 F.3d 643 (7<sup>th</sup> Cir. 2003); *In re Aimster Copyright Litigation*, 2004 WL 206188 (7<sup>th</sup> Cir. Jan. 29, 2004).

Mr. Deep ultimately sought voluntary dismissal of his first bankruptcy case on February 24, 2003. In July 2003, he filed a motion to vacate the dismissal, but his request was denied by

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<sup>2</sup>All references herein to the Copyright Owner Creditors refer to the approximately forty-eight record company and movie studio creditors of Mr. Deep.

an order entered on July 16, 2003. Mr. Deep filed his second chapter 13 case on July 22, 2003 (Case No. 03-14925). In the context of his second bankruptcy case, Mr. Deep filed an adversary against the Copyright Owner Creditors, *Deep v. The Recording Industry Association of America et al.* (Adv. No. 04-90037). On May 20, 2004, Mr. Deep filed a motion to withdraw the reference in the adversary proceeding with the District Court for the Northern District of New York. His second case and the related adversary proceeding were dismissed by order entered May 21, 2004, as a result of a motion to dismiss filed by the Copyright Owner Creditors. Mr. Deep's motion to reconsider the court's dismissal order was denied as to his underlying bankruptcy case, but granted as to the adversary proceeding for the limited purpose of allowing Mr. Deep's request to the district court for withdrawal of the reference to proceed.

Pursuant to statute, the Copyright Owner Creditors informed the MDL Court of Mr. Deep's adversary proceeding by filing a notice of a tag along action with the MDL Court.<sup>3</sup> On May 5, 2004, the MDL Court responded by transferring Mr. Deep's adversary proceeding against the Copyright Owner Creditors and other related matters pending in the District Court of Illinois to the District Court of Maine before the Honorable D. Brock Hornby.

Mr. Deep filed his third and current chapter 13 case on January 4, 2005. The hearings on confirmation, objections to confirmation, and claims objections were adjourned on a number of

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<sup>3</sup> **§ 1407. Multidistrict litigation.**

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

occasions pending the outcome of the related litigation before Judge Hornby.<sup>4</sup> Judge Hornby recently issued a decision in connection with the Copyright Owner Creditors' motion to dismiss the lawsuits dismissing the federal claims, with prejudice, and abstaining from the state law claims against the lawyer defendants named in the lawsuits, and dismissing all the state law claims against the other defendants, with prejudice, except two counts against Trans World, *Deep v. The Recording Industry Ass'n of America et al.*, 05-cv-118 and 05-cv-149 (D.Me. Oct. 2, 2006).

In September 2005, Mr. Deep advised the court in writing that he may have grounds to pursue a tort action against his former attorneys, Boies Schiller & Flexner, LLP.<sup>5</sup> Mr. Deep requested that the court scheduled a conference with the chapter 13 trustee to determine what course of action would be in the best interests of his creditors. A conference pursuant to 11 U.S.C. § 105 was held on September 20, 2005, and adjourned several times. An adjourned conference was held on December 1, 2005.

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<sup>4</sup> Two lawsuits were transferred by the Multidistrict Litigation Panel to Judge Hornby in the District Court of Maine. The first was the adversary proceeding that was commenced here, *Deep v. The Recording Industry Ass'n of America et al.* (Adv. No. 04-90037). The District Court later withdrew the reference, *Deep v. The Recording Industry Ass'n of America et al.*, No. 04-mc-055 (N.D.N.Y. Feb. 7, 2005), and the MDL Panel transferred it to Maine on June 21, 2005, *Deep v. The Recording Industry Ass'n of America et al.*, No. 05-cv-205 (N.D.N.Y. June 21, 2005). The second case was initiated by Deep in New York State Supreme Court, Albany County, *Deep v. The Recording Industry Ass'n of America et al.*, 50-05 (N.Y. Sup. Ct. May 4, 2005). Mr. Deep removed the state court case to the District Court for the Northern District of New York, *Deep v. The Recording Industry Ass'n of America et al.*, No. 05-cv-693 (N.D.N.Y. June 3, 2005). The MDL Panel transferred it to Maine on August 1, 2005, *Deep v. The Recording Industry Ass'n of America et al.*, No. 05-cv-205 (N.D.N.Y. Aug. 1, 2005).

<sup>5</sup> Mr. Deep has not commenced any actions in this court against David Boies, Esq., Boies, Schiller & Flexner, LLP, or Strauss & Boies, LLP. They are named as defendants in the two lawsuits transferred to Maine and in an action pending in New York State Supreme Court, Albany County, *Deep v. Boies*, No. 6453-05 (N.Y. Sup. Ct. 2005).

In June 2006, Mr. Deep commenced an action against Amici and XYZ Company Nos. 1 - 25, *Deep v. Amici LLC & XYZ Company Nos. 1- 25*<sup>6</sup> (Adv. No. 06-90169). In the context of the adversary proceeding, Mr. Deep filed an emergency motion to enforce the automatic stay and enjoin the threatened sale of his alleged property by the Amici defendants to Xerox. The emergency motion was served on counsel for Amici LLC, the Chapter 13 Trustee, and the office of the United States Trustee. A hearing was held on July 11, 2006. In addition to counsel for Amici and the Chapter 13 Trustee, counsel for Urbach, Kahn & Werlin and Legal Scientific Group, and George Carpinello, Esq., attorney for David Boies, Esq., Boies, Schiller & Flexner, LLP, and Strauss & Boies, LLP, attended the hearing.

During the July 11 hearing, the court acknowledged that Attorney Carpinello had not filed any pleadings with regard to Mr. Deep's emergency motion but inquired if Attorney Carpinello had a position that he would like to place on the record. Attorney Carpinello initially responded by stating that he strongly opposed Mr. Deep's motion.

The event that precipitated Mr. Deep's motion in this court, namely the sale of Amici to Xerox for \$174 million, also lead to Mr. Deep's filing of a motion with Judge Hornby in the District Court of Maine seeking to name additional defendants, Robert Higgins, William Duker, Amici LLC, and Datamine LLC, to his pending lawsuits. Judge Hornby denied Mr. Deep's motion on June 21, 2006. The court denied Mr. Deep's emergency motion, finding the underlying complaint sought relief similar, if not identical, to the relief sought in Mr. Deep's lawsuit pending before Judge

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<sup>6</sup>Mr. Deep states in his adversary that Defendant XYZ Company Nos. 1-25 are other limited partnerships, limited liability companies, corporations, partnerships, sole proprietorships, or other entities or persons that are owned and/or controlled, directly or indirectly, by Amici LLC, that were involved in or wrongfully benefited from the conduct alleged herein, but whose identities are as yet unknown. (Deep's Amici Complaint ¶ 33.)

Hornby in Maine, *Deep v. The Recording Industry Ass'n of America et al.*, 05-cv-118

(D.Me. 2005). Judge Hornby found it inappropriate to add Amici to those lawsuits. Without the basis for an underlying adversary proceeding in this court, the court found no basis upon which to enforce the automatic stay or enjoin the sale of Amici or any of its assets. An order was entered on July 25, 2006, denying Mr. Deep's emergency motion (the "July 25 Order"). Amici's request to dismiss Mr. Deep's complaint, contained within their opposition papers, was found to be procedurally defective and was denied, along with their request for sanctions. However, the court *sua sponte* dismissed the complaint against Amici LLC & XYZ Company Nos. 1-25 and denied any request for a stay pending appeal pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure.

Mr. Deep filed a Motion for Reconsideration of the July 25, 2006 Order and a Motion for Change of Venue to [the] District of Maine. (Adversary No. 06-90169, Nos. 16 & 18.) All of the parties present at the July 11 hearing were also present at the August 16, 2006 hearing, in addition to counsel for the County of Albany and counsel for MapInfo Corp. It was during the August 16 hearing that Mr. Deep, for the first time, informed the court he objected to Attorney Carpinello's appearance. Mr. Deep acknowledged that he did not oppose Attorney Carpinello's appearance at the July 11 hearing but argued he had only recently researched his concerns and now believed Attorney Carpinello's appearance to be improper. The court stated that Attorney Carpinello could respond to respond Mr. Deep's statements on the record, but noted there was no motion before him concerning Attorney Carpinello's appearance. Attorney Carpinello declined to do so.

The court denied Mr. Deep's motion for change of venue finding that his request was premature based upon the fact that Judge Hornby had not yet issued his decision. The court also

denied Mr. Deep's motion for reconsideration.

### **ARGUMENT**

Mr. Deep asserts the court's recusal is required because of the personal bias and prejudice it harbors in favor of Attorney Carpinello, a partner at Boies, Schiller & Flexner, LLP, or the appearance of such personal bias. In support of this conclusion, Mr. Deep relies upon (1) the statements allegedly made by the court at the December 1, 2005 conference regarding Attorney Carpinello, and (2) statements and rulings made by the court at the July 11 and August 25, 2006 hearings. Mr. Deep alleges that at the December 1, 2005 conference, the court stated "words to the effect that 'I know George Carpinello and George Carpinello would never be involved in any ethical violations'." (Deep's Mot. for Recusal 3.) Mr. Deep also alleges that by allowing "[Attorney] Carpinello's reckless intrusion into the July 11 and August 16 hearings," the court created an appearance of personal bias or prejudice. (Deep's Mot. for Recusal 10.) More specifically, Mr. Deep asserts Attorney Carpinello deceived the court thereby causing the court to make remarks and conduct its hearings in such a manner that an appearance of partiality was created. Mr. Deep contends that because he had no notice that Attorney Carpinello would be appearing at the hearings and allegedly no opportunity to be heard, he characterizes the statements made by Attorney Carpinello at the hearings as *ex parte*. Mr. Deep also alleges the court's bias stems from contacts and communications the court had with Attorney Carpinello before being appointed to the bench. (*Id.* at 9.) Based upon his assertions, Mr. Deep concludes the court's recusal is required because it can no longer be an impartial tribunal.

Amici, David Boies, Boies, Schiller & Flexner LLP, Strauss & Boies, LLP, MapInfo Corporation, Urbach, Kahn & Werlin and Legal Scientific Analysis Group filed objections to

Mr. Deep's motion. These parties have argued that Mr. Deep has failed to substantiate a legitimate basis for his motion and point out that statements Mr. Deep claimed were ex parte communications made by Attorney Carpinello were actually statements made on the record in open court. The parties accuse Mr. Deep of forum shopping because of the unfavorable rulings he received from the court in connection with his motions for injunctive relief against Amici and for a transfer of venue.

### DISCUSSION

Mr. Deep seeks recusal of the court pursuant to 28 U.S.C. §§ 455(a) and (b)(1).<sup>7</sup> These statutes require the court to recuse itself based upon a question of impartiality, bias or prejudice. Although the statute does not express a time requirement for filing a motion to recuse, the Second Circuit has held that a recusal claim under § 455 may be waived or forfeited if it is brought in an untimely fashion. *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768, 794 (2d. Cir. 2002). A party seeking disqualification must do so at the earliest opportunity after the facts upon which the motion for recusal is based become known. *See Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). The Second Circuit in *Apple* outlined four factors for a court to consider when evaluating the timeliness of a motion for recusal, including whether (1) the movant has participated in a substantial manner in a trial or pre-trial proceeding; (2) granting the

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<sup>7</sup> **§ 455. Disqualification of justice, judge or magistrate judge**

(a) Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

28 U.S.C. § 455.

motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment, and (4) the movant can demonstrate good cause for delay. *Id.* at 334.

Mr. Deep's motion is premised on an alleged statement made by the court at a conference held on December 1, 2005, yet Mr. Deep waited approximately nine months after the statement was made and after receiving three unfavorable decisions from this court to file his motion. While the court questions the timeliness of Mr. Deep's motion, given the nature of Mr. Deep's the allegations, the court deems it appropriate to address the substance of Mr. Deep's motion.

Section 455(a) of Title 28, applicable to bankruptcy judges by way of Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 5004(a), provides that a judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The test for recusal is an objective one which assumes that a reasonable person knows and understands all the relevant facts. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989)(citation omitted). As articulated by the Second Circuit, the inquiry is whether "an objective, disinterested observer fully informed of the underlying facts, [would] entertain sufficient doubt that justice would be done absent recusal," or alternatively, whether "a reasonable person, knowing all the facts," would question the judge's impartiality. *United States v. Yousef*, 327 F.3d 56, 169 (2d Cir. 2003)(quoting *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992)(citations omitted)).

With respect to the December 1, 2005 conference, the court has no specific recollection of making the specific statements Mr. Deep alleges the court made on that date. The December 1, 2005 conference was held in chambers and, as is customary, was not recorded as no affirmative relief was being sought. Even if the court did make statements concerning Attorney

Carpinello's reputation as an attorney, the court finds that it falls short of establishing cause for recusal. Section 455(a) addresses the appearance of bias. "Actual impartiality is irrelevant under 455(a) because the statute speaks only to the appearance of impartiality." *In re Owens Corning, et al.*, 305 B.R. 175, 188 (D.Del. 2004). Statements made by the court about an attorney's character or demeanor are not necessarily cause for recusal. The alleged statement did not go to the merits of Mr. Deep's pending bankruptcy case, or indicate the court was predisposed as to a matter before it

The court's decision to allow Attorney Carpinello to state his position on the record during the July 11, 2006 hearing, despite not having filed a response to Mr. Deep's emergency motion, is a matter of discretion for the court. Pursuant to Local Rule 9013-1(f)(2) (Motion Practice - Answering Papers), the court can hear oral opposition to a motion without papers being filed. The court has wide discretion as to whom it will hear from at oral argument. Contrary to Mr. Deep's assertion, he did have the opportunity to respond to Attorney Carpinello's oral argument. Attorney Carpinello's appearance at the July 11, 2006 hearing on behalf of David Boies, Boies, Schiller & Flexner, LLP, and Strauss & Boies, LLP should not have come as a surprise to Mr. Deep. Although not specifically named in the complaint filed against Amici and XYZ Company, the complaint is replete with accusations of wrongdoing against these attorneys. In addition, these attorneys were named as defendants in the two lawsuits pending before Judge Hornby in Maine containing causes of action very similar, if not identical, to those asserted in the complaint filed against Amici and XYZ Company in this court.

Mr. Deep's allegations that the court made remarks during the August 16, 2006 hearing based on its "personal belief ... that Mr. Carpinello would never be involved in ethical

violations” are without merit. (Deep’s Mot. for Recusal 8.) The sentences and phrases made by the court as outlined in Mr. Deep’s motion, were made at the end of the hearing as the court was explaining its decision to deny Mr. Deep’s motion to transfer venue. The court stated that until Judge Hornby ruled on the motion to dismiss before him, it would not be logical to move an Albany based chapter 13 bankruptcy case to Maine. Depending on how Judge Hornby ruled, there could potentially have been no issues, a narrow issue, or many issues remaining before him. The court’s statements were for the benefit of all the parties, but in particular for Mr. Deep as a pro se litigant. The court’s statements and rulings relied upon by Mr. Deep do not demonstrate evidence of deep-seated favoritism or antagonism that would make fair judgment impossible, which is necessary to succeed on a motion for recusal based upon 28 U.S.C. § 455(a). In light of all the facts and circumstances presented, the court finds that a reasonable person would not conclude that the court’s impartiality could fairly be questioned under 11 U.S.C. § 455(a).

Mr. Deep asserts that the court’s bias stems from contacts and communications the court had with Attorney Carpinello before being appointed to the bench. Prior to taking the bench, the court served as chapter 12 and 13 standing trustee for the Northern District of New York, as well as a chapter 7 and 11 trustee, and prior to that was in private practice. As a result, the court came to know many of the practitioners that come before it on a professional basis, including Attorney Carpinello. Attorney Carpinello has appeared before this court on other bankruptcy matters, and thus the court has formed an opinion as to his practice in this court, as it has with many of the attorneys that practice here. Such does not warrant recusal due to bias or partiality. As indicated by the Supreme Court:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

*Liteky v. United States*, 510 U.S. 540, 555 (1994).

Section 455(b) of Title 28, applicable to bankruptcy judges by way of Fed.R.Bankr.P. 5004(a), mandates recusal in certain specific circumstances where partiality is presumed. *United States v. Bayless*, 201 F.3d 116, 126 (2d. Cir. 2000). Section 455(b)(1) provides that a judge shall disqualify himself if he has “a personal bias or prejudice concerning a party.” 28 U.S.C. § 455(b)(1). Recusal under § 455(b)(1) “is required only if actual bias or prejudice is proved by compelling evidence.” *O’Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7<sup>th</sup> Cir. 2001).

The court’s statements and rulings relied upon by Mr. Deep do not demonstrate evidence of personal bias or prejudice, which is necessary to succeed on a motion for recusal based upon §455(b)(1). Section 455(b)(1) addresses actual bias and personal knowledge derived from an extrajudicial source, information that is learned outside the judicial proceeding. Many of the court’s remarks outlined in Mr. Deep’s motion go to this court’s decision on how best to proceed with Mr. Deep’s chapter 13 case while awaiting decisions from other courts on issues relevant to the bankruptcy. Much of what the court knows of Mr. Deep’s litigation pending in other state, federal and MDL courts comes from a review of documents from those courts and information provided by the parties. However, “facts learned in off-the-record conferences with parties are not derived from an extra judicial source.” *In re Owens Corning, et al.* at 191.

The court is and has always been cognizant of Mr. Deep's pro se status and has attempted to give him every benefit of the doubt when dealing with his case. It would appear, however, that the crux of Mr. Deep's argument is that he does not agree with the findings and conclusions of law made by the court at the July 11 and August 16 hearings. Mr. Deep is of the opinion that because the court adopted the positions argued by Attorney Carpinello it is somehow biased towards Attorney Carpinello. Mr. Deep overlooks that the position argued by Attorney Carpinello was also supported by counsel for Amici, MapInfo, Urbach, Kahn & Werlin and Legal Scientific Analysis Group. If disagreeing with a party's position demonstrates bias, all non-prevailing parties in this court would have a basis to seek the court's recusal. If Mr. Deep disagrees with the court's ultimate decisions, he has a remedy. He may utilize the appellate process.

Mr. Deep's motion, although layered with a myriad of cases from several districts, circuits, and the Supreme Court, does not provide specific, substantive instances which support an order for recusal. In addition, granting Mr. Deep's motion now would not be in the interest of justice and would certainly be a waste of judicial resources given the history of this case in this court, particularly after the entry of Judge Hornby's decision on October 6, 2006, dismissing all of Mr. Deep's federal claims with prejudice. At this juncture, the court is in a position to proceed with confirmation of Mr. Deep's chapter 13 plan, and the related issues surrounding confirmation. This court finds that in light of all of the facts and circumstances that are known, there is no basis to conclude this court has been impartial, biased or prejudiced against Mr. Deep. Accordingly the court denies the motion to recuse itself.

Based upon the forgoing, it is hereby

ORDERED, that the motion shall be and hereby is denied.

Dated: 11/7/06  
Albany, New York

/s/ Robert E. Littlefield, Jr.  
Honorable Robert E. Littlefield, Jr.  
United States Bankruptcy Judge