

MAR 22 2018

David J. Smith
Clerk

CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint No. 11-17-90024

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. Bankruptcy Judge for the U.S. Bankruptcy Court for the _____ District of _____, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ has filed this Complaint against United States Bankruptcy Judge _____, under Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (JCDR).

As an initial matter, after _____ filed his Complaint, he filed three supplemental statements. The filing of the supplemental statements is permitted. See 11th Cir. JCDR 6.7.

I. _____ Allegations Against Judge _____

In 2009 _____ first appeared before _____ as a party in bankruptcy proceedings involving a nursing home that _____ owned. Some of the allegations in _____ Complaint arise from those proceedings. Other allegations concern proceedings before Judge _____ where _____ was not a party. _____ alleges that Judge _____:

- (1) Lied about the extent of his earlier representation of a party in _____ bankruptcy cases, failed to recuse himself, and had ex parte contact with one of his former law partners;
- (2) Issued an opinion in which he “lied about the ‘facts’ regarding” _____;
- (3) Improperly found _____ and others in contempt and ordered that they be arrested by the marshals and incarcerated without due process and without district court review;

(4) Made allegedly inappropriate comments in open court —

- a) at one hearing referred to bankruptcy as entering _____ where you can come into the court, but the judge says when you can get out;
- b) at another hearing called the father of a debtor “a despicable human being, the lowest form of life”; and
- c) at another hearing called an attorney an “asshole.”

This Order will begin by discussing the bankruptcy proceedings in which _____ was a party. That discussion first addresses the nursing home’s Chapter 11 bankruptcy proceedings and then a related adversary proceeding that the nursing home filed against _____. After recounting that background information, it addresses _____ allegations about Judge _____ conduct in those proceedings and in other proceedings where _____ was not a party.

A. _____ Chapter 11 Bankruptcy Proceedings

The record shows that in February 2009 _____, a nursing home that _____ owned, filed for Chapter 11 bankruptcy. (_____ Bankruptcy Case No. _____). The nursing home filed a motion for turnover of property arising from its dispute with two companies managed by _____. At a February 2009 hearing before Judge _____ on the turnover motion, counsel for those two companies mentioned that before he became a judge, Attorney _____ had represented _____. Counsel told the court: “[S]ome years ago Mr. _____ [_____] was referred to a very good attorney in _____ by the name of _____, and he represented that gentleman in an attempt to purchase a nursing home, and I understand it was a day or two, or something like that, and we wanted to bring it to your Honor’s attention.”¹ Judge _____ stated, “Thank you for mentioning it. Had you not, I would have.”

About that earlier representation and presumably the question of recusal, Judge _____ stated that it was counsel for the nursing home’s “call.” Counsel for the nursing home responded, “As long as you don’t personally feel a conflict, we don’t have a problem with it.” Judge _____ stated, “Okay. It’s been a while, and I think that the representation was sufficiently attenuated that if everybody is comfortable with it, let’s proceed.”² At that point, no one objected. The parties later reached a settlement

¹ _____ name sometimes appears in the record as “_____,” but for the sake of consistency, this order will use only the “_____” spelling.

² An appeal challenging the recusal decision is currently pending before this Court.
See _____.

agreement. In March 2009 Judge _____ entered an order approving that settlement agreement and dismissing the action without prejudice.

In August 2009 _____ again filed for Chapter 11 Bankruptcy, and _____ signed the petition as the “Managing Member.” (_____ Bankruptcy Case No. _____). The case was later assigned to Judge _____. _____ of the law firm _____ (_____), filed a notice of appearance as counsel for a creditor.³ On January 7, 2010, Judge _____ entered an order granting the nursing home’s motion for approval of a settlement agreement between certain parties and finding that _____ had breached the first settlement agreement in several ways, including “by attempting to embezzle \$ _____ of the [nursing home’s] funds.” _____ appealed the order, but the district court later dismissed that appeal for failure to prosecute. (_____ Case No. _____).

In March 2010 _____, as a creditor and “former debtor-in-possession,” filed a *pro se* motion seeking Judge _____ recusal based on his earlier involvement with _____ and others. He also sought to vacate the order approving the settlement agreement, which had been entered a year before. _____ asserted that he believed that Judge _____ had committed perjury or was incompetent. In an attached declaration, _____ stated that Judge _____, when he was an attorney in private practice, had represented _____ in another matter for three years — not just “a day or two” — and that Judge _____ had been partners with _____ at the _____ law firm.

Judge _____ denied the motion to recuse, finding that he had not misrepresented the scope of his earlier representation and that _____ had consulted him over a period of a few days on another unrelated matter. Judge _____ stated, “In hindsight, it would have been helpful for me to clarify [counsel’s] ‘day or two, or something like that’ comment on the record.” In any event, he explained: “Had any interested party voiced its concerns about the potential conflict, I would have seriously considered recusal at that time. But I did not feel partial, and the parties expressed their views on the record. They were not concerned, I was not concerned, and we proceeded.”

_____ filed a motion to reconsider, which Judge _____ denied, noting that his “prior representation in unrelated matters has been on the record since the beginning of this case.” In January 2011 _____ filed a motion seeking Judge _____ recusal in light of his actions and his decision not to recuse in a different case in which _____ was not a party. Judge _____ construed the motion as a second motion for reconsideration and ordered it stricken. After various additional proceedings, in November 2015 Judge _____ entered a final decree and closed the case.

³ Judge _____ had been a shareholder at the _____ firm before he was appointed to be a judge.

B. The Nursing Home's Adversary Proceeding against _____

While the nursing home's chapter 11 bankruptcy proceedings were ongoing before Judge _____, on January 29, 2010, the nursing home, through counsel, filed an adversary proceeding against _____ and two companies, seeking to recover what it contended were embezzled funds belonging to the estate. (_____ Bankruptcy Case No. _____). In late March 2010, Judge _____ granted a motion for entry of final default judgment against the defendants. In addition to awarding monetary damages, the order permanently enjoined _____ from contacting _____, _____, and others, with certain exceptions, in light of the threatening tone of _____ earlier emails to parties and attorneys involved in the case. The order provided that if _____ violated the injunction, he would be required to show cause at a hearing why he should not be held in contempt, and if he failed to appear, the court would direct the United States Marshals Office to take him into custody in order to ensure that he appear at the hearing.

On April 8, 2010, _____, as counsel for a creditor, filed an emergency motion for a hearing, contending that _____ had violated the injunction by contacting _____ by email and telephone and that _____ had harassed and threatened _____ wife and child. The same day, Judge _____ granted the motion and directed the Marshals Service to apprehend _____. The order quoted an email sent to _____, which had been filed with the motion. It stated in part:

I promise when you come out of hiding Tuesday bight [sic] your lives will be worst [sic] than mine.

You might not realize it, but they end tomorrow at 1:00.

Tell _____ "thanks" for his testimony.

Denying your signature on a Therapy contract, when _____ notarized it, and _____ is in the deposition [sic], was classic.

And the DOJ had no idea about these "usury" loans you make to non Jews

"the world is anti-Semitic, so Jews should steal from eveyone [sic]?"

You believe that?

I'm not anti semitic

I just hate you

Judge _____ found that it was more likely than not that _____ had sent that email. He also concluded that the email threatened to murder _____, and in the context of the case the threat was credible.

On April 19, 2010, Judge _____ entered an order stating that the Marshals Service had informed him that _____ was apprehended on April 17, 2010, and a hearing was set for April 20, 2010. At that hearing, an attorney appeared on _____ behalf and agreed from the outset that a _____ was warranted and necessary. _____ counsel stated that everyone agreed that “we need to find out what’s going on with [_____], and also to make sure that the other parties are satisfied that there’s nothing — no actual threat to their lives, which is clearly a reasonable concern for the Court.” The court stated:

I’m perfectly prepared to have _____, but you’re going to need to make arrangements with the marshals for him to have at least a _____ so that I can get some _____ testimony before me from someone who is competent to give it as to what _____ is. And I’m not going to release him from the custody of the marshals until I am given some assurance of exactly what the proposition is.

_____ counsel requested clarification about whether the matter involved civil or criminal contempt, as each had “due process concerns that need to be satiated.” Judge _____ responded that _____ should be evaluated to determine whether he had a _____, explaining:

let’s try to figure out how we can remediate this problem rather than dealing with it in either a purely criminal, or purely civil sense.

When I hear from a _____ who can tell me what this is about, and what’s going on, then it would be possible for me to consider the kinds of things that you’re suggesting.

Judge _____ entered an order directing that _____ receive a _____ while in custody.

At the next hearing on April 26, 2010, a _____ testified about his preliminary assessment of _____, noting that _____ was remorseful and would be amenable to _____. The parties generally discussed what the next steps should be. The next day, in accordance with what _____ himself had requested at the hearing, Judge _____

entered an order directing the Marshals Service to transfer _____ to the _____ to be held pending further order of the court and directing that he receive a _____.⁴

At a May 5, 2010 hearing, a _____ testified that he believed _____ presented no risk of harm to himself or to anyone else involved in the case. Judge _____ stated that he would order that _____ be released from custody with the understanding that he would voluntarily enroll in a treatment program. The same day, Judge _____ entered an order directing the Marshals Service to release _____. In October 2011 the adversary proceeding was dismissed for lack of prosecution.

C. Appeal to the District Court in the Chapter 11 Bankruptcy Proceedings

In the chapter 11 bankruptcy proceedings, the nursing home appealed Judge _____ final decree to the district court. _____, through counsel, filed a brief contending, among other things, that Judge _____: (1) lacked jurisdiction to issue the final decree order; (2) had failed to disclose his relationship with _____ and others involved in the litigation; (3) had an ex parte communication with _____; and (4) should have recused himself from the case.

_____ later filed a “Verified Motion for an Order Clarifying and/or Certification to the Eleventh Circuit Court of Appeals as to Non-Article III Judge’s Jurisdiction to Order Arrest and Incarceration by the U.S. Marshals Without *Prior* Article III Judge’s Review.” In that motion, he contended that he had a “genuine fear” that Judge _____ would “illegally attempt to incarcerate” him, and he stated that he believed that Judge _____ had issued at least ten orders directing the Marshals Service to arrest and incarcerate people without seeking prior review from the district court. _____ filed a supplement to that motion arguing that Judge _____ had recently issued another order directing the Marshals Service to apprehend someone without prior review by an Article III judge.

On March 24, 2017, District Judge _____ entered an order denying _____ appeal and his motions. Judge _____ found that: (1) _____ could not reopen issues that he had failed to prosecute in his earlier appeal; (2) the bankruptcy court’s findings of fact were not clearly erroneous and it had applied the correct legal standards; (3) the bankruptcy court did not abuse its discretion with regard to any discretionary rulings; (4) none of the circumstances in 28 U.S.C. § 455(b) requiring a judge to disqualify himself was present in the case; (5) the principle of equitable mootness supported denial of the appeal; and (6) _____ sought an “unconstitutional advisory

⁴ At the April 26 hearing, _____ told the court: “_____.” Later, Judge _____ explained, “_____.” _____ responded, “_____.” Judge _____ replied, “_____.” And at the end of the hearing, Judge _____ told _____, “_____.”

opinion” from the court regarding Judge _____ possible future conduct, and the court declined to issue such an opinion.

_____ appealed the district court’s order, and that appeal is pending before this Court. _____, No. _____. Some of the issues that _____ has raised in that appeal overlap with some of the allegations in his Complaint, and to the extent that he is challenging the correctness of Judge _____ rulings, including a decision not to recuse, that challenge may be addressed as a merits-related issue in that appeal. See JCDR 3(h)(3)(A) (providing that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling” and stating that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related”).

II. Allegations about Recusal, Ex Parte Contact, and Fact Findings in an Opinion

_____ generally contends that, because of Judge _____ past connections to _____, he should have recused himself from the bankruptcy cases involving _____ and _____. He asserts that Judge _____ lied about the scope of his earlier representation of _____ as a practicing lawyer. He also alleges that Judge _____ engaged in ex parte contact with _____, who is his former law partner, and other attorneys with _____, which is his former law firm. He asserts that Judge _____ should have recused himself from cases in which _____ or any lawyer from _____ appeared as counsel. Additionally, he complains that Judge _____ issued an opinion in which he “lied about the ‘facts’ regarding” _____.

A. Allegations about Recusal

_____ contends that Judge _____ should have recused himself from the bankruptcy proceedings in which _____ and _____ were parties. He alleges that Judge _____ “worked for his client, _____, two years AFTER becoming a U.S. Bankruptcy Judge IN THE SAME CASE, and to this day, has refused to admit it.” He asserts that Judge _____ “lied” and said it was a one or two day representation and called it “consulting.” _____ states that Judge _____ was listed as a witness in a case involving _____ and that a sitting bankruptcy judge being paid as a witness “appears to be illegal.”

In his first supplemental statement, _____ reiterates his allegations about Judge _____ decision not to recuse himself. He states that after he filed his initial Complaint, “two Orders have been issued that support” Judge _____, and that he is adding those orders to his Complaint “so that [he] cannot be accused of withholding information that does not support [his] Complaint.”

This is not the first time _____ has made those allegations in a judicial misconduct complaint. He filed a similar complaint against Judge _____ in 2010. In that complaint, he alleged that Judge _____ had exhibited a disability and had “lied” at the February 2009 hearing on the motion for turnover of property in the main _____ bankruptcy case, No. _____. He asserted that Judge _____ lied when he did not dispute the statement that he had represented _____ in a previous matter for only one or two days, when in fact the representation had lasted from February 2003 until February 2006. _____ also discussed his belief that Judge _____ suffered from a “disability” because he “forgot” about the following: the scope of his representation of _____, his testimony as a witness for _____ regarding a dispute over an “unpaid legal bill,” and his connection to _____.

In an order dated November 29, 2010, then-Chief Judge _____ dismissed that judicial misconduct complaint as merits-related or based on allegations lacking sufficient evidence. _____ did not file a petition for review, and the matter was closed in February 2011.

When a current complaint repeats the allegations contained in a previously dismissed one, it is appropriate to dismiss those repeated allegations and address only allegations that have not previously been considered. See JCDR 11(c)(2). With respect to _____ allegations that Judge _____ lied about his representation of _____ in a previous matter and should have recused himself from the bankruptcy proceedings in which _____ was involved, those allegations have already been considered in connection with _____ earlier complaint. See id. _____ has presented no material information that was not previously considered. See id. Furthermore, the allegations about recusal are “directly related to the merits of a decision or procedural ruling” because “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” JCDR 3(h)(3)(A). As a result, that part of the Complaint is **DISMISSED**. See 28 U.S.C. § 352(b)(1)(A)(ii); JCDR 11(c)(1)(B).

B. Allegations about Ex Parte Contact

_____ alleges that Judge _____ had ex parte contact with _____, his former law partner, in a case in which _____ was not a party, resulting in an order being incorrectly reversed on appeal before this Court. In his first supplemental statement _____ reiterates that allegation. He quotes documents that were filed with the bankruptcy court, orders, and excerpts from transcripts. He asserts that Judge _____ was a witness for _____ in one case while presiding over another case in which _____ was appearing as counsel. In a footnote, _____ states, “You would assume that _____ must have communicated with” Judge _____ about the settlement of a case.

In his second supplemental statement, _____ states that he has discovered a transcript from August 2008 that is relevant to his allegation that Judge _____ engaged in ex parte contact with his former law firm, _____. He states that the transcript demonstrates that Judge _____ former law firm was participating in a case in which Judge _____ was appearing as a “witness” on the same day that the firm was appearing in a different case over which Judge _____ was presiding.

One of the transcripts that _____ submitted with his second supplemental statement shows that attorney _____ appeared at a hearing before Judge _____ on August 25, 2008, in a bankruptcy case. At that hearing, _____ stated that then-attorney _____ had been the first attorney on the case before he became a judge. She discussed a motion to dismiss that he had filed in the case and arguments that had been made earlier in the case. The transcript does not indicate that Judge _____ appeared as a witness or appeared before the court in any capacity after he became a judge. The other transcript that _____ submitted shows that on the same day, August 25, 2008, Judge _____ held a hearing in a different and completely unrelated case, and a different lawyer from the _____ firm appeared in that case and argued before Judge _____.

The allegation that Judge _____ had inappropriate ex parte contact with _____ or his former law firm and that the ex parte contact caused this Court to incorrectly reverse a judgment on appeal lacks “sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D), and is directly related to the merits of a decision, *id.* 11(c)(1)(B). As a result, that part of the complaint is **DISMISSED**. See 28 U.S.C. § 352(b)(1)(A)(ii) & (iii); JCDR 11(c)(1)(B) & (D).

To the extent _____ is alleging that Judge _____ engaged in misconduct in deciding not to recuse himself from cases in which _____ or his former law firm of _____ was participating, that allegation is directly related to the merits of Judge _____ decisions or procedural rulings, see JCDR 11(c)(1)(B); *id.* 3(h)(3)(A) (providing that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related”). As a result, that part of the complaint is also **DISMISSED**. See 28 U.S.C. § 352(b)(1)(A)(ii); JCDR 11(c)(1)(B).

C. Allegations about Fact Findings in an Opinion

_____ alleges that Judge _____ “‘published’ an Opinion where he lied about the ‘facts’ regarding” _____, specifically by stating that _____: (1) “was ‘found’ to have embezzled money from the bankruptcy estate, without notice of a hearing, a hearing, etc.”; and (2) “‘threatened violence’ against [Judge _____] former law partner, _____, other unknown lawyers at his former law firm, _____, and also against their CHILDREN.”

_____ allegation that Judge _____ issued an opinion in which he “lied” about facts concerning _____ is directly related to the merits of Judge _____ decisions or procedural rulings. The allegation challenges the substance of the fact findings in a judicial opinion, and because it is “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), that part of the Complaint is **DISMISSED**. See 28 U.S.C. § 352(b)(1)(A)(ii); JCDR 11(c)(1)(B).

III. Allegation that Judge _____ Improperly Found People in Contempt and Ordered that They Be Arrested by the Marshals and Incarcerated

_____ alleges that Judge _____ “[r]efuses to follow that rule that non-Article III Judges must ask for review of an Article III Judge before having the U.S. Marshals arrest and incarcerate anyone.” He notes that, “[a]s late as two months ago,” Judge _____ ordered “a father and a son arrested.” He states that Judge _____ “‘finds’ people in Contempt of Court without any due process, including notice, a hearing, an attorney, having charges read against them, etc.” He contends that “[t]his denies the person the ability to get bail or bond or a public Defender.” He later states that Judge _____ “has a five year old ‘arrest warrant’” outstanding in a bankruptcy case in which _____ is not a party. He also contends that Judge _____ “ignored” the orders of district and circuit judges.

He attached documents to his complaint, including documents filed and orders issued in various cases as well as newspaper articles that discuss Judge _____ rulings. In his first supplemental statement, he complains about Judge _____ denial of his pro se motion that sought to “clarify” or “certify” to this Court that Judge _____ could not arrest people without prior Article III Judge review. He asserts that Judge _____ found that his motion was “unconstitutional” but that it is unconstitutional to put people in jail illegally. He alleges that Judge _____ “never charges anyone with a crime, gives them ‘notice,’ gives [them] the opportunity for bail or the right to a Public Defender.”

A. Criminal and Civil Contempt Authority

Courts’ powers of criminal contempt are set out in 18 U.S.C. § 401, which provides:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as--

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401; see also United States v. Cohn, 586 F.3d 844, 845 (11th Cir. 2009) (holding that criminal contempt “is a *sui generis* offense and that it is neither a felony nor a misdemeanor”).

“Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders.” In re Ocean Warrior, Inc., 835 F.3d 1310, 1316 (11th Cir. 2016) (quotation marks omitted). “Distinct from the bankruptcy courts’ inherent contempt powers, 11 U.S.C. § 105 creates the bankruptcy courts’ statutory civil contempt power.” Id. Section 105(a) provides in part, “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). “Civil penalties must either be compensatory or designed to coerce compliance.” In re Ocean Warrior, Inc., 835 F.3d at 1317 (quotation marks omitted).

This Court has noted that “[i]n addition to the traditional sanctions for coercing compliance with an injunction—incarceration or financial penalty . . . —a bankruptcy court may issue orders to obviate conduct that stands to frustrate administration of the Bankruptcy Code” Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 966 (11th Cir. 2012). We have also stated, “A Bankruptcy Court has the power to imprison a debtor for contempt of court when the debtor fails to comply with a Turn Over Order.” In re Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002). In that case, this Court also reminded the district and bankruptcy courts “that civil contempt sanctions are intended to coerce compliance with a court order,” and “[w]hen civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor’s due process rights.” Id. at 1300 (quotation marks omitted).

This Court has noted that the “line between civil and criminal contempt sanctions is not always clear” In re McLean, 794 F.3d 1313, 1323 (11th Cir. 2015). “Sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.” Id. (quotation marks omitted). “Punitive sanctions, by contrast, take the form of a fixed fine and have no practical purpose other than punishment; it is immaterial to a court imposing such sanctions that a contemnor might be fully in compliance with the order in question at the time the sanctions are imposed.” Id.

This Court has stated that in determining whether a sanction for contempt is coercive rather than punitive, it must ask: “(1) whether the award directly serves the complainant rather than the public interest and (2) whether the contemnor may control the extent of the award.” *Id.* (quotation marks omitted). While due process requires only “skeletal” protections in civil contempt proceedings, “criminal contempt is a crime in the ordinary sense, and so due process requires more stringent protections in criminal contempt proceedings.” *Id.* at 1324 (quotation marks and alterations omitted).

In his Complaint and first supplemental statement _____ discusses a number of cases in which Judge _____ held people in contempt. He also attaches various documents related to those cases. _____ alleges that Judge _____ engaged in misconduct in two cases involving criminal contempt and in several cases involving civil contempt.

B. _____ Incarceration for Criminal Contempt

The record establishes that in a bankruptcy case involving the _____ family, Judge _____ held _____ in criminal contempt and ordered her incarceration before any district court review of the matter. The district court later concluded that the bankruptcy court had exceeded its authority.

In connection with multiple bankruptcy petitions that had been filed by the _____ family, Judge _____ held a hearing on April 22, 2011. At that hearing, he found that _____ was in criminal contempt, he continued the hearing until May 4, 2011, and he remanded _____ to the custody of the U.S. Marshals for the intervening time, which was about two weeks.

On May 4, 2011, Judge _____ findings of fact and conclusions of law related to the _____ criminal contempt matter were filed with the district court (the case was before Judge _____, who was then a district judge). Judge _____ found that _____ had: repeatedly disregarded bankruptcy court orders, filed bankruptcy petitions in violation of court orders, lied to the court in written filings and testimony under oath at the April 22 hearing, misleadingly filed bankruptcy petitions in her parents' names, and filed those petitions with the sole intent of forestalling foreclosure proceedings.

Two days later on May 6, Judge _____ held a status conference with _____ attorney and an Assistant United States Attorney. After the conference, he immediately ordered _____ released from custody based on his “preliminary research,” which indicated that Judge _____ had exceeded his authority by ordering _____ incarceration for criminal contempt without district court intervention or review.

On October 13, 2011, Judge _____ entered an order concluding that a bankruptcy court does not have the authority to hold a person in criminal contempt prior to district court review. The order explained that “the bankruptcy court issued its proposed findings of fact and conclusions of law after it had incarcerated _____ as a punitive sanction for criminal contempt and kept her in custody without any ending date in sight,” and “[t]hat course of action put the proverbial cart before the horse.” Judge _____ declined to issue an order directing _____ to show cause why she should not be held in criminal contempt and stated that the U.S. Attorney’s Office was “of course . . . free to determine on its own whether criminal contempt proceedings against _____ should be initiated based on the conduct described by the bankruptcy court.” Because of his view that Judge _____ did not have the authority to incarcerate _____ without district court approval, he rejected Judge _____ findings of facts and conclusions of law as a nullity.

C. _____ Incarceration for Criminal Contempt

In another bankruptcy case Judge _____ entered an order on January 17, 2013 finding that _____ had acted in bad faith and had engaged in civil and criminal contempt in open court. The order stated that “[a]lthough this Court believes that it has the authority to impose sanctions for criminal contempt, this Court is not organized in a manner which would permit the orderly imposition or administration of such sanctions.” The order explained: “Neither the United States Attorney, who prosecutes criminal contempt actions in the District Court, nor the Public Defender, normally appear in Bankruptcy Court. Nor is this Court in a position to direct the administration of psychological evaluations which appear to be appropriate under the facts presented here.”

The order went on to state: “_____ was taken into custody by the United States Marshal this morning in order to further prevent contemptuous conduct in open court and to preserve the safety and decorum of the courtroom. He remains in custody.” Judge _____ ordered _____ “remanded to the custody of the United States Marshal pending further order of the court.” The order recommended (1) that the district court refer the matter to the U.S. Attorney for possible prosecution for criminal contempt, (2) that _____ be given a psychological evaluation, and (3) that the district court impose sanctions.

The next day, on January 18, 2013, a hearing was held before a magistrate judge, and _____ was released after promising that he would appear (either in person or by telephone) at a hearing on January 30. At that hearing, _____ appeared by telephone, and the government stated that it did not intend to pursue charges against him. Even though _____ was no longer in custody and the government had stated that it did not intend to pursue charges against him, on May 20, 2013, Judge _____ issued an order “declin[ing] to take further action with respect to _____,” and “affirm[ing]

the Government's opinion . . . that the Bankruptcy Court exceeded its authority in holding _____ in criminal contempt."

_____ order in _____ case quoted Judge _____ October 2011 order in the _____ case, which had stated that no statute or rule expressly gives a bankruptcy court the independent authority to punish criminal contempt through incarceration. The order reiterated Judge _____ observation that some circuits have held that bankruptcy courts do not have that authority and other circuits have expressed doubt about the existence of that authority. As for binding authority, the order noted that this Court has held that 11 U.S.C. § 105(a) permits bankruptcy courts to issue punitive orders as necessary or appropriate to carry out the provisions of the Bankruptcy Code, but that case dealt with monetary sanctions instead of incarceration. See In re Jove Eng'g, Inc., 92 F.3d 1539, 1554 (11th Cir. 1996). Judge _____ declined to impose any further sanctions or take any further action against _____.

_____ allegations about the _____ and _____ contempt orders challenge the correctness of two decisions that have already been reviewed and addressed on the merits by district judges. Apart from the _____ and _____ contempt orders, the other contempt orders that _____ complains about involve civil contempt and were issued to coerce compliance with court orders. Civil contempt orders are within the scope of a bankruptcy court's authority. See 11 U.S.C. § 105; In re Ocean Warrior, Inc., 835 F.3d at 1316. The allegations that Judge _____ engaged in misconduct in connection with his findings of contempt and orders that individuals be held in custody are "directly related to the merits of a decision or procedural ruling." JCDR 11(c)(1)(B). For that reason, under 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B), that part of the Complaint is **DISMISSED**.

D. _____ Incarceration

To the extent _____ is complaining about his own incarceration during the adversary proceeding arising from the nursing home's chapter 11 bankruptcy proceedings, the record indicates that there was no finding of criminal or civil contempt.⁵ As this order has discussed, the record shows that an emergency motion alleged that _____ had violated the bankruptcy court's injunction by contacting a party in the case and harassing and threatening that man and his family. Judge _____ found that _____ had sent an email threatening murder, and he ordered the U.S. Marshals to apprehend _____. Judge _____ later entered an order stating that the Marshals Service had informed him that they had _____ in custody, and the order set a hearing

⁵ In his third supplemental filing, _____ attached a copy of the complaint from the lawsuit he filed against Judge _____ on February 28, 2018. The complaint asserts claims of false imprisonment, defamation, intentional infliction of emotional distress, and bankruptcy fraud.

for the next day. At the hearing _____ counsel agreed from the outset that a _____ was warranted and necessary. At the next hearing, six days later, the parties, including _____ himself, discussed what the next steps should be. _____ requested a _____, and one was ordered.

Nine days later, a _____ testified that he had evaluated _____ and believed that he was not a risk to himself or others. _____ was released and agreed to seek _____ immediately.

At no time during those proceedings did _____ or his counsel seek review by the district court, even though now, nearly eight years later and in the form of a complaint about judicial misconduct, _____ challenges the merits of Judge _____ decisions and rulings in those proceedings. Because _____ allegations that Judge _____ engaged in misconduct when he ordered _____ detained by the U.S. Marshals are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), under 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B), that part of the Complaint is also **DISMISSED**.

IV. Allegations About Comments Made in Open Court

_____ alleges that Judge _____ made inappropriate comments in open court. He asserts that Judge _____ (1) at one hearing referred to bankruptcy as entering _____ where you can come into the court, but Judge _____ says when you can get out; (2) at another hearing called the father of a debtor “a despicable human being, the lowest form of life”; and (3) at another hearing called an attorney an “asshole.”

A. The “_____” Comment

_____ asserts that in a bankruptcy case in which he was not a party, Judge _____ compared bankruptcy to _____. A transcript _____ attached to his Complaint contains the excerpt from a hearing in which _____ comment was made. It arose in the context of a procedurally complex case in which _____ claimed that she was entitled to control the substantial assets in the estate of her deceased aunt and uncle, _____ and _____, who founded the _____. In addition to litigation in other courts, on February 23, 2011, _____ filed a voluntary Chapter 11 petition, and the case was assigned to Judge _____. He converted the case to Chapter 7, and after that, _____ tried to withdraw her bankruptcy petition. In defiance of court orders, _____ failed to appear in court and at a required meeting of creditors.

_____, a non-attorney who claimed to be _____ close friend and “lawful representative,” attempted to seek a stay and submitted other filings in the case. Following various proceedings, _____ — who had never appeared or produced any court-ordered documents — was held in contempt. The Trustee filed a motion to hold

_____ in contempt, and Judge _____ held a show cause hearing on that motion on November 1, 2011. A transcript from that hearing shows that Judge _____ stated:

_____ theory, apparently, is that having filed a voluntary petition, she can file a voluntary dismissal. I think all of us in this room know that that ain't so, and that the Bankruptcy Court is, in that regard, more like _____, which actually is an apt analogy in this case.

You can get in, but you only get out when I say you can get out, and until _____ cooperates, she is not getting out of this bankruptcy proceeding .

...

The context establishes that _____ comment was simply a metaphorical way to describe the nature of Chapter 11 bankruptcy proceedings, which unlike a Chapter 13 case, cannot be voluntarily dismissed without the bankruptcy court's approval. The allegation that _____ comment was inappropriate is unpersuasive. It did not constitute misconduct, and as a result, that part of the Complaint is **DISMISSED**. See 28 U.S.C. § 352(b)(1)(A)(iii); JCDR 11(c)(1)(D).

B. The "Despicable Human Being" Comment and the "Asshole" Comment

_____ complains that Judge _____ called the father of a debtor "a despicable human being, the lowest form of life" and expressed regret that the son "has to deal" with the father. _____ attached to his Complaint a transcript showing that the comment was made at a hearing.

The case in which the comment was made involved a debtor whom Judge _____ had held in civil contempt for failure to appear and failure to produce documents. The marshals brought the debtor before the court, and after hearing his testimony, Judge _____ determined that the debtor's father had coerced the young man into filing a bankruptcy petition in an attempt to thwart the foreclosure proceedings on the father's home.

At a later hearing where the father had been ordered to appear, Judge _____ expressed his view that the son's filing of a bankruptcy petition "had been instigated, and perhaps enforced by his father." He stated: "There is no reason for the [son] to have a bankruptcy on his record as a result of coercive actions by his father and a \$350 credit card bill. That's absurd." The hearing transcript shows that Judge _____ questioned the father about whether he had coerced his son to file for bankruptcy. Judge _____ also asked about bankruptcies that the father himself had filed. Then Judge _____ said, "I think you're lying to me." He went on to say: "I think you are the lowest form of life for putting your son through this. You are a despicable human being, and you can go through life either believing that or not. It is certainly my view that you are, and I regret

very much that your son has to deal with you.” Judge _____ stated that he was dismissing the son’s bankruptcy case and expunging it.

In addition to those comments, _____ also complains about a comment that Judge _____ made in an unrelated case to an attorney who had filed a motion seeking to sanction a younger attorney. In harsh terms, Judge _____ warned the more experienced attorney that if he continued to engage in sharp practice, he would get a bad reputation among other lawyers. A transcript _____ attached to his Complaint shows this exchange between Judge _____ and that attorney:

THE COURT: — [I]f you do this kind of stuff in practice, you’re going to get a reputation as a real asshole. Don’t do it.

And I use that word in the sense that it was used by the California philosopher Aaron James, who wrote the book “Assholes: A Theory,” which was published in 2012. It distinguishes between assholes and regular kinds of jerks, and whichever one of those you are, whether it is a different category of jerk, or if I was correct in identifying you as an asshole, then sobeit. It’s one or the other. Don’t do it anymore.

Thank you.

[ATTORNEY]: I apologize to the Court, your Honor.

_____ complains that the comments to the father of the debtor and to the attorney whom Judge _____ thought had engaged in sharp practice constitute misconduct. The rules governing judicial conduct define “[c]ognizable misconduct” as “conduct prejudicial to the effective and expeditious administration of the business of the courts.” JCDR 3(h)(1). Misconduct includes “treating litigants, attorneys, or others in a demonstrably egregious and hostile manner.” *Id.* 3(h)(1)(D).

Rule 11(a) requires the chief judge to review complaints of judicial misconduct or disability and determine what action should be taken on them, and one permissible course of action is to conduct a limited inquiry. *See* JCDR 11(a) & (b). In conducting a limited inquiry, the chief judge “may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents.” JCDR 11(b); *see also* 28 U.S.C. § 352(a).

In conducting that inquiry, the chief judge “must not determine any reasonably disputed issue.” JCDR 11(b). In the present matter, the transcripts indisputably show the comments and that they were made in open court. Because the comments could be viewed as evidence of a judge “treating litigants, attorneys, or others in a demonstrably

egregious and hostile manner,” JCDR 3(h)(1)(D), I conducted a limited inquiry into these allegations. See id. 11(b).

In conducting that inquiry, former Chief Judge _____ and I met with Judge _____ and discussed the matter with him.⁶ He expressed sincere remorse about having made the comments and acknowledged that they could be viewed as egregious and hostile. After we discussed the matter, Judge _____ decided to take appropriate voluntary corrective action in order to acknowledge and remedy the problems the Complaint raised regarding inappropriate statements. See JCDR 11(d)(2).

Rule 11(d) provides in part, “The chief judge may conclude a complaint proceeding in whole or in part if . . . the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.” JCDR 11(d)(2); see also 28 U.S.C. § 352(b)(2). With respect to this rule, the “Commentary on Rule 11” instructs that “action taken after a complaint is filed is ‘appropriate’ when it acknowledges and remedies the problem raised by the complaint.” JCDR 11 cmt. The Commentary explains:

Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures.

Id. (citations omitted).

The Commentary notes that “[c]orrective action’ must be voluntary action taken by the subject judge.” Id. It explains:

Where a subject judge’s conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. While the Act is generally

⁶ In conducting a limited inquiry, “the chief judge, or a designee, may communicate orally or in writing with . . . the subject judge, and any others who have knowledge of the matter.” JCDR 11(b). When was serving as chief judge in _____, Judge _____ ruled on a complaint _____ filed against Judge _____, which raised some of the same allegations as the present complaint. As a result Judge _____ had “knowledge of the matter” that made his participation in the meeting with Judge _____ appropriate and helpful. See id.

forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. In some cases, corrective action may not be “appropriate” to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge’s order, in a direct communication from the subject judge, or otherwise.

Id. (citations omitted). In light of that guidance, Judge _____ decided to write letters of apology to the two people to whom the harsh comments were directed. In the letters, Judge _____ stated that he sincerely apologized for his “abusive words and tone.” He sent the letters to the addresses that the court had on file for those two people.

He also sent me copies of the letters along with a cover letter to me, pledging to refrain in the future from any conduct or comments that treat attorneys or litigants in an egregious or hostile manner. He admitted his error and stated that he will do his best in the future to give no one cause to question his judicial temperament. He is aware of the potential consequences if he does not keep that pledge. Judge _____ also stated that in light of these proceedings, if any appeal pending in this Court should be remanded to the bankruptcy court, or if any other matter involving _____ appears on his docket, he will recuse himself from the case.

To the extent the Complaint concerns Judge _____ inappropriate statements, Judge _____ “has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.” JCDR 11(d)(2). As a result, that part of the Complaint is **CONCLUDED**. See 28 U.S.C. § 352(b)(2); JCDR 11(d)(2).



Chief Judge