U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

**ENTERED**

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed October 22, 2004.**

**United States Bankruptcy Judge**

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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| IN RE: | § | |
| | § | |
| GEORGES ABBOUD HAJJE AND | § | CASE NO. 04-50266-RLJ-7 |
| TAMMY STANFIELD HAJJE, | § | |
| | § | |
| DEBTORS | § | |

**MEMORANDUM OPINION AND ORDER**

The Court considers the motion of Max Tarbox, the chapter 7 trustee, seeking sanctions against the debtors and debtors' counsel (the "Motion for Sanctions"). On April 27, 2004, the debtors, Georges and Tammy Hajje, filed their Motion to Recuse Trustee and Appoint a Replacement Trustee (the "Motion to Recuse"), requesting that the Court recuse Max Tarbox as trustee in the debtors' case and appoint a different trustee. Mr. Tarbox's Motion for Sanctions, filed July 7, 2004, submits that the Motion to Recuse was factually unfounded, that debtors' counsel, Dennis Boren, made no reasonable inquiry concerning the allegations made in the motion, and that it was filed for an improper purpose. Mr. Tarbox

requests that the debtors and debtors' counsel be sanctioned in accordance with Rule 9011, Fed. R. Bankr. P., Local Rule 83.8, 28 U.S.C. § 1927, and 11 U.S.C. § 105(a).

This Court has jurisdiction of this matter under 28 U.S.C. §§ 1334(b) and 157(b). This is a core proceeding under 28 U.S.C. § 157(b)(1) and (b)(2). This Memorandum Opinion contains the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

Georges and Tammy Hajje filed this bankruptcy proceeding under chapter 7 of the Bankruptcy Code on March 2, 2004. Max Tarbox was appointed chapter 7 trustee in the case. The Hajjes' meeting of creditors under section 341 of the Bankruptcy Code was held April 16, 2004.[1] The allegations made the subject of the Motion to Recuse filed by the Hajjes arise out of the 341 creditors' meeting. Specifically, the Hajjes' Motion to Recuse alleges that at the 341 meeting Mr. Tarbox asked Mr. Hajje to state his "national/ethnic origin" and, after such question, "Mr. Tarbox vigorously and bluntly asked questions many times expressing his displeasure of the debtors and to the debtors." The Hajjes contended that Mr. Tarbox's questions and overall demeanor created an appearance of impropriety and was perhaps intended to "intimidate or improperly bolster Mr. Tarbox's authority over other races, colors, or creeds." By the Motion to Recuse, the Hajjes argue that they were denied their equal protection rights under the United States Constitution.

The Motion to Recuse triggered an investigation by the United States trustee. The

[1]Section 343 of the Bankruptcy Code (11 U.S.C.) requires that the debtor(s) must appear and submit to examination under oath at the meeting of creditors under section 341(a) of the Code. Section 341(d) states the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 is aware of, among other things, the debtor's ability to file a petition under a different chapter of the Code. 11 U.S.C. §§ 341, 343.

report of the United States trustee, which was filed with the Court as a response to the Motion to Recuse, states that there was "no inappropriate behavior, language, inflections, or inquiry in [Tarbox's] conduct." The United States trustee concluded there was no cause justifying Mr. Tarbox's removal.

The evidence reveals that the allegations of fact made the subject of the Motion to Recuse are blatantly untrue and were made by debtors' counsel without even minimal investigation or consideration of the possible consequences.

First, Dennis Boren, debtors' counsel, and author of the Motion to Recuse, was not present at the 341 creditors' meeting. Bob Heald, an attorney at Price & Heald, attended the 341 creditors' meeting for Mr. Boren. Mr. Heald testified that Mr. Tarbox handled the creditors' meeting in a professional manner and that no improper or insensitive question or comment was made by Mr. Tarbox. Mr. Heald stated that, at most, Mr. Tarbox may have had some difficulty pronouncing the debtors' name and, as part of an exchange with the debtors, the debtors volunteered that their name was middle-eastern. He emphasized, however, that nothing occurred that could be considered insensitive or improper. A witness, Sam Gregory, an attorney who was present on another case and was waiting in the hearing room, testified that he heard no improper question or comment during the 341 creditors' meeting of the Hajjes. Mr. Tarbox testified and admitted he may have had some difficulty pronouncing the debtors' name, but did not recall asking Mr. and Mrs. Hajje of their ethnicity. He testified he was shocked by the allegations in the Motion to Recuse. He further testified, which was confirmed by Mr. Boren, that he was not contacted by Mr. Boren prior to the filing of the Motion to Recuse.

Second, the transcript of the 341 creditors' meeting reveals that, at least while being

recorded, Mr. Tarbox asked no question regarding the Hajjes' ethnicity or national origin. In fact, the transcript reveals that the creditors' meeting was handled routinely and professionally. During the meeting, Mr. Tarbox mentioned that he was bothered by the Hajjes not having filed a chapter 13 case given their level of income. In this regard, Mr. Tarbox filed a report with the United States trustee suggesting that the case be investigated for a possible substantial abuse filing under section 707(b) of the Bankruptcy Code.[2]

Mr. Hajje testified and stated that Mr. Tarbox handled the meeting in a professional manner, but, upon Mr. Tarbox struggling to pronounce his name, he (Mr. Hajje) advised that he was Turkish. In fact, it is not clear from Mr. Hajje's testimony that he considered any questioning from Mr. Tarbox to be offensive. He did testify that his wife almost had a nervous breakdown as a result of the 341 creditors' meeting. He stated that he and his wife were concerned both that Mr. Tarbox may be prejudiced in some fashion and that their case may be considered a substantial abuse case and converted to chapter 13. Mr. Hajje testified that he was born in Beirut, Lebanon, and lived in Turkey before immigrating to the United States.

Mrs. Hajje testified that Mr. Tarbox asked a pointed question concerning the reason for the Hajjes having filed chapter 7 rather than chapter 13. This was followed, according to Mrs. Hajje, by a question asking their national origin. She stated that all questions seemed vigorous and blunt and that she was embarrassed by the entire process.

After the 341 creditors' meeting, the Hajjes attempted to contact Mr. Boren and, being

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[2]Section 707(b) provides that, upon motion by the court or the United States trustee, a chapter 7 individual debtor's case may be dismissed if granting relief to such debtor under chapter 7 would constitute a substantial abuse of the provisions of chapter 7. 11 U.S.C. § 707(b).

unable to do so, arranged a followup meeting with Mr. Boren. Upon conferring with Mr. Boren, the Hajjes, particularly Mrs. Hajje, advised Mr. Boren that they were upset after the 341 meeting. Apparently it was at this time that the Hajjes advised Mr. Boren that Mr. Tarbox had asked a question concerning their national origin and had been offensive at the creditors' meeting. Mrs. Hajje testified that she authorized Mr. Boren to file the Motion to Recuse and that she did not consider the matter resolved, even at the time of the hearing before this Court, as Mr. Tarbox had never apologized for his conduct.

As stated, the transcript of the 341 creditors' meeting reveals that the trustee asked no questions regarding the Hajjes' ethnicity or national origin. The Hajjes stated that the offensive question, if there was one, was asked prior to going on the record. Mr. Heald and Mr. Gregory both recalled Mr. Tarbox perhaps struggling to pronounce the Hajjes' name and, as a result, it was mentioned that Mr. Hajje was middle-eastern or Turkish.

In short, the evidence reveals there was no basis in fact for the allegations made the subject of the Motion to Recuse. The Court next addresses the inquiry made by Mr. Boren prior to filing the motion.

As previously noted, Mr. Boren did not attend the 341 creditors' meeting. Mr. Heald appeared in his stead. Parties present were the debtors, Georges and Tammy Hajje, and Max Tarbox, the trustee. Sam Gregory, an attorney appearing on another case was present in the meeting room, as well. The Hajjes reported their concerns to Mr. Boren. Mrs. Hajje authorized Mr. Boren to file the Motion to Recuse. Mr. Hajje stated that he had not seen the Motion to Recuse and was unclear whether he even discussed the Motion to Recuse or its content with Mr. Boren. Mr. Boren did not confer with either Mr. Heald or Mr. Tarbox before filing the motion. He also did not obtain a copy of the recording of the proceedings before

filing the Motion to Recuse.

Mr. Boren decided to file the motion after discussing the matter principally with Mrs. Hajje. There is no evidence that Mrs. Hajje is of middle-eastern descent. Mr. Boren made no other investigation of the facts.

The Court next considers whether, under the circumstances, the withdrawal of the Motion to Recuse rectified the debtors' groundless allegations. In this regard, the Hajjes' filed a notice of withdrawal of the Motion to Recuse on May 5, 2004, stating the "problem has been resolved." Mr. Boren testified that the Hajjes elected to withdraw the Motion to Recuse because their case had been declared a no-asset case and the appointment of a replacement trustee was rendered moot. Trustee's counsel, David Langston, had, on May 4, 2004, sent a letter to Mr. Boren demanding that the Motion to Recuse be withdrawn without qualification and that the trustee be compensated for the expenses incurred on the matter. It appears the notice of withdrawal was contemplated and filed prior to Boren receiving the May 4 letter from Mr. Langston.

By letter dated May 11, 2004, from Mr. Langston to Mr. Boren, Mr. Langston informed Mr. Boren that the withdrawal was inadequate as it stated a "problem" was resolved thereby inferring that their originally was a problem. The letter demanded that Boren file a pleading stating that the allegations of the Motion to Recuse were unfounded. No such pleading was filed. By letter dated June 15, 2004, Mr. Langston forwarded a copy of the trustee's proposed Motion for Sanctions to Mr. Boren and advised Mr. Boren that, as per Rule 9011(c) of the Rules of Bankruptcy Procedure, Boren must take appropriate corrective action regarding the Motion to Recuse within twenty-one days or the trustee would file the Motion for Sanctions and request a hearing on the matter. No action was taken by Mr. Boren in

response to the June 15 letter. Mr. Langston and Mr. Boren apparently had at least one further phone conversation after this point at which time they discussed Boren submitting a possible stipulation of facts which might resolve the matter. However, the parties were unable to reach an agreement concerning any stipulation.

Rule 9011 provides in pertinent part as follows:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,–
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> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
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> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
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> > (1) How initiated
> > > (A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe),

> the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
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> (2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
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> (A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

FED. R. BANKR. P. 9011.

The Fifth Circuit in *Topalian v. Ehrman*, 3 F.3d 931 (5th Cir. 1993), in reviewing other Fifth Circuit authority, held that a trial court, in issuing sanctions under Rule 11 of the Federal Rules, must make findings concerning the following four factors:

1. The conduct being punished or deterred;
2. The expenses or costs incurred by the violation of Rule 11;
3. Whether the costs or expenses are reasonable, as opposed to self-imposed, mitigable, or the result of delay in seeking court intervention; and

4. Whether the sanction is the least severe sanction adequate to achieve the purposes of the Rule.

*Id.* at 937.

The filing of the groundless Motion for Recusal is obviously the actionable conduct in this case. The allegations are untrue and without merit. Mr. Boren, who did not even attend the 341 creditors' meeting, made no investigation whatsoever prior to filing the motion. Had he conferred with Mr. Heald, he would have learned that his clients' concerns were, at a minimum, possibly overstated. A simple review of the recording of the 341 meeting would have established that the 341 meeting was routine and evidences no intimidating or insensitive conduct by Mr. Tarbox. Finally, the testimony of Mr. Hajje at the hearing before this Court, if consistent with what he told Mr. Boren, would have established that any concerns regarding Mr. Tarbox's conduct at the meeting were meritless. The filing of the Motion to Recuse was reckless. Moreover, when given an opportunity to clear the air, Mr. Boren refused and failed to do so. Withdrawing the motion by stating the problem was resolved did not cure the problem. Such a statement does indeed imply that there was a problem initially.

The expenses and costs incurred as a result of the violation of Rule 11 include, at a minimum, the fees and costs incurred by Mr. Tarbox in responding to the Motion to Recuse and prosecuting the Motion for Sanctions. Mr. Tarbox requests reimbursement of fees and expenses of $7,500. The Court has reviewed the detailed time sheets introduced into evidence and finds the fees and expenses are fair and reasonable under the circumstances. The Court finds that Mr. Tarbox and his counsel acted diligently in responding to the Motion to Recuse. The only delay in the matter was the continuance, at the debtors' request, of the original setting on the Motion for Sanctions.

In addressing whether an award of $7,500 is the least severe to achieve the purposes of Rule 9011, the Court finds that the entirety of the fees relate directly to the groundless pleading and subsequent failure to cure the pleading. The fees would have been significantly less had the debtors and Mr. Boren withdrawn their motion without qualification. At the hearing before this Court, both Mr. Boren and Mrs. Hajje continued to assert that Mr. Tarbox was in some manner offensive or insensitive at the creditors' meeting. The evidence reveals this is false. The Court can only conclude that an award in the amount requested is the least severe sanction to achieve the purposes of the Rule.

Under the circumstances, the Court believes that the Motion to Recuse was intended, at least in part, to harass or intimidate Mr. Tarbox and to perhaps obtain a "friendlier" trustee, one who would not refer the case to the United States trustee as a potential substantial abuse case. Rule 9011 allows the court to sanction both counsel and the party. In this case, both Mr. Boren and the Hajjes must share responsibility for filing a meritless motion. The Court will, therefore, direct that Mr. Boren shall remit as a sanction the sum of $6,000 and that Georges and Tammy Hajje remit as a sanction the sum of $1,500.

Upon the foregoing, it is hereby ORDERED that sanctions are awarded in favor of the trustee, Max Tarbox, in the sum of $7,500; it is further

ORDERED that of the $7,500 sanction, Dennis Boren shall pay the sum of $6,000 and Georges and Tammy Hajje shall pay the sum of $1,500. Such award is not joint and several.

### End of Memorandum Opinion and Order ###