

23-90030-jm
January 24, 2024
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 23-90030-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

In May 2023, the Complainant filed a complaint with the Clerk’s Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 (the “Act”), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the “Rules”), charging a magistrate judge (the “Judge”) of this Circuit with misconduct.

BACKGROUND

The Complainant is the plaintiff in a pending civil rights lawsuit that has been referred to the Judge for general pretrial purposes. In April 2023, counsel for the defendants filed a letter requesting the Judge’s assistance in resolving a discovery dispute; specifically, the letter represented that the Complainant had noticed the defendant’s deposition and had refused to consent to rescheduling it

when defense counsel stated that he had a scheduling conflict on the proposed date for the deposition. The Judge held a conference in May 2023, and the docket reflects that the Judge and parties agreed on a date, time, and location for the Complainant's deposition and the defendant's deposition.

The basis for the misconduct complaint, which was filed the day before the conference described above, is unclear. The Complainant attaches a copy of defense counsel's letter requesting a conference, as well as a copy of a notification from the Judge's chambers indicating that a conference had been scheduled, and argues that defense counsel "failed to file an objection to deposition"; thus, the Judge's order scheduling the conference was allegedly "void Ab Initio for want of admissible evidence." The Complainant continues: "I believe this is Trespass to my claim and wish that this misconduct be investigated and sanction be imposed for above mentioned actions."

DISCUSSION

The complaint is dismissed.

As noted, the basis for the misconduct complaint is unclear and it is not obvious that the Complainant alleges misconduct at all. But to the extent an allegation can be discerned, the Complainant appears to challenge the Judge's

order scheduling a conference, claiming that the order was void “ab initio.” This is a claim that the Judge erred, not that he engaged in misconduct. Accordingly, the claim is dismissed as “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352(b)(1)(A)(ii); Rule 4(b)(1) (“Cognizable misconduct does not include an allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse.”); 11(c)(1)(B). Purely merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge’s decision or procedural ruling.” Rule 4 cmt. If the Complainant wishes to challenge the Judge’s scheduling orders, he may do so, to the extent the law allows, only through normal appellate procedures.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.