

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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*In re:*

**TOBACCO ROAD ASSOCIATES, LP**

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: **CIVIL NO. 06-CV-2637**  
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**MEMORANDUM OPINION & ORDER**

**RUFE, J.**

**March 30, 2007**

Presently before the Court is a series of fourteen appeals from orders of the United States Bankruptcy Court for the Eastern District of Pennsylvania. The fourteen appeals, which were initially filed separately, have been consolidated into this single action to be addressed by the Court concurrently.

**I. FACTUAL & PROCEDURAL BACKGROUND**

These consolidated appeals have a complicated history, both factually and procedurally. Essentially, the appeals arise from a dispute about ownership interests in an entity, Tobacco Road Associates, LP (“TRA LP”<sup>1</sup>), whose prime asset is a warehouse located in Lancaster County, Pennsylvania. The dispute has generated a flurry of litigious activity, including these appeals.

**A. Factual Background**

The events underlying this dispute began in 2002, when Gary Wilson and Leon Winitzky purchased an old tobacco warehouse in East Hempfield Township, Pennsylvania, with a

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<sup>1</sup> The Court will use “TRA LP” to refer to the Appellee in this matter, even though at least some of the Appellants purported to represent the interests of TRA LP in the Bankruptcy Court.

plan to convert it into residential condominiums. After obtaining an agreement of sale on the warehouse, they assigned it to a newly created limited partnership, TRA LP. Winitzky used a corporation, Winitzky Associates, to hold a 49.5% limited partnership interest in TRA LP. Another corporation, Stinson Reliant Corporation (“Stinson Reliant”), held an equal limited partnership interest in TRA LP.<sup>2</sup> The final 1% was held by a newly created limited liability company, called Tobacco Road Associates, LLC (“TRA LLC”), in which Winitzky Associates and Stinson Reliant held equal shares.<sup>3</sup>

Wilson claims that he asked his girlfriend, Doris McClure, to hold any interest that he had in Stinson Reliant in escrow as a “straw party.” While steps were being taken to convert the property, Wilson cared for the warehouse and secured various tenants who provided some income to the venture. In caring for the property, Wilson apparently hired certain people to perform services necessary to its maintenance.

By 2004, Winitzky expressed an interest in removing himself from the project. A real-estate developer and potential investor, Thomas Spano, began to evaluate a potential takeover of the project. Sometime in 2004, while he was negotiating the purchase of TRA LP, Spano began to invest capital in the project as a precursor to his eventual takeover, in order to keep the project afloat until the details could be finalized.

By July 2005, an agreement for Spano to purchase all interests in the project had been proposed and prepared for signatures. A copy of the agreement was given to Wilson a week before

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<sup>2</sup> Stinson Reliant was wholly owned by Winitzky Associates, at least at the time of the sale in July 2005, but Wilson claims that he owned at least part of Stinson Reliant before the transaction.

<sup>3</sup> At various points in this Opinion, the entities that were partners of TRA LP will be referred to generally as the “TRA LP entities.”

it was to be signed so that he could review it with his attorney, John J. Koresko, V, Esquire. Under the agreement, two LLCs created by Spano through his attorney, Timothy Sullivan, Esquire—Astral Enterprizes, LLC (“Astral”), and Griffin Enterprizes, LLC (“Griffin”)—would purchase the equal interests in TRA LP and TRA LLC previously held by Stinson Reliant and Winitsky Associates.<sup>4</sup> The agreement included a consent-and-waiver provision whereby Wilson consented to the transfer and waived any rights that he may have had under any prior agreement or arrangement related to the project.<sup>5</sup> The agreement further provided that 100% of the stock in Stinson Reliant would be transferred to Wilson, making him sole owner of the corporation and its assets.<sup>6</sup> The sales agreement also contained a release agreement in which each party mutually released the others from claims pertaining to the ownership interests in TRA LP and TRA LLC, and the activities of the parties related thereto.<sup>7</sup> Winitsky and Spano signed the agreement on July 12, 2005. A day later, on July 13, 2005, Wilson signed the agreement and release.<sup>8</sup>

Thereafter, Wilson apparently continued to perform some duties related to the warehouse project, though his activities were limited by illness in late 2005. Spano continued to

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<sup>4</sup> Appellants make much of the fact that the agreement referred to Astral Enterprises and Griffin Enterprises, rather than Astral Enterprizes and Griffin Enterprizes. According to Appellants, the sales agreement is totally void as a result of this typographical error. The Court will address this argument in its discussion concerning the motions to dismiss, *infra* Section III.A.4.

<sup>5</sup> Agreement for Purchase & Sale [Ex. # 78] § 5. In this Memorandum Opinion, all citations to Exhibits are made to the Record in No. 06-2637, unless otherwise noted.

<sup>6</sup> *Id.* § 1(c). It appears that, at the time of the transfer, Stinson Reliant owned at least a recycling company, an airplane, and some trailers. N.T. Hr’g 5/8/06, at 104.

<sup>7</sup> Agreement for Purchase & Sale, at Ex. B.

<sup>8</sup> Wilson claims that, on the day that he signed the agreement, he presented Spano with a memorandum that detailed his belief that he would retain his partnership interest in the project. That memorandum, or any discussion about his remaining interest, was not included in the sales agreement or release agreement signed by Wilson on July 13. Nowhere does the sales agreement mention that Wilson would retain any interest in TRA LP or the TRA LP entities. In fact, the agreement explicitly states otherwise. *See id.* § 1(c).

provide Wilson with healthcare coverage while Wilson underwent and recovered from surgery. At some point before the current dispute arose, Spano removed Wilson from the group coverage. Shortly thereafter, Wilson initiated the various litigation described below.

## **B. Procedural Background**

The current dispute arose on February 1, 2006, when Koresko, on behalf of Wilson, filed a Praecipe for a Writ of Summons in the Court of Common Pleas of Lancaster County, Pennsylvania, naming as defendants: (1) TRA LP; (2) TRA LLC; (3) Spano, d/b/a Astral; (4) Spano, d/b/a Griffin; (5) Spano, individually; (6) Winitsky; (7) McClure; and (8) PNC Bank, N.A. (“PNC”). That same day, Wilson also filed a *Lis pendens* against the real estate owned by TRA LP located at 191 North Broad Street, East Hempfield Township, Lancaster County, Pennsylvania—that is, the warehouse.

On March 23, 2006, Christopher S. Underhill, Esquire entered his appearance for Defendants TRA LP, TRA LLC, Astral, Griffin, and Spano, and filed a Petition to Strike the *Lis pendens*. On March 27, 2006, a rule was entered on Wilson to show cause why he was entitled to the relief he requested.

On April 19, 2006, two days before the rule was due, Koresko simultaneously filed both voluntary and involuntary bankruptcy petitions in this Court. The involuntary petition was filed against TRA LP by petitioning creditors Wilson, Kit Gee, and Richard Wilson, and was docketed at Bankruptcy No. 06-20469. Koresko signed the involuntary petition as attorney-in-fact for all three petitioning creditors. The voluntary petition was filed on behalf of TRA LP as debtor, and was docketed at Bankruptcy No. 06-20470. Koresko signed the voluntary petition both as attorney for the debtor and on behalf of the debtor itself, as attorney-in-fact. The petition was later amended to

include Wilson's signature, suggesting his authority to file the petition on behalf of TRA LP as a partner. Both cases were assigned to Judge Richard E. Fehling of the United States Bankruptcy Court's Reading Division.

On April 26, 2006, TRA LP, through its counsel, Underhill, filed motions to dismiss the voluntary and involuntary bankruptcy petitions. The motion to dismiss the voluntary petition was premised on the argument that Wilson had no ownership interest in TRA LP and, therefore, did not have the authority to file a voluntary petition on behalf of the limited partnership.<sup>9</sup> The motion to dismiss the involuntary petition was based on the argument that because the petitioning creditor's claims were subject to a bona fide dispute as to liability and amount, the creditors were ineligible to file the involuntary petition, and the Bankruptcy Court was required to dismiss the petition.<sup>10</sup> TRA LP requested expedited hearings on both motions and a hearing was scheduled for Monday, May 8, 2006, at 2:00 p.m. In response, Koresko filed motions to rescind or extend the expedited hearing scheduled for May 8. The Bankruptcy Court scheduled a hearing on those motions for May 8, at 1:45 p.m.

Between the date on which the bankruptcy petitions were filed and the hearings on the motions to dismiss, Appellants filed the necessary documents and applications, including an application to employ Koresko and the Koresko Law Firm as counsel for the alleged debtor.<sup>11</sup>

The motions to rescind or extend the expedited hearing were heard by the Bankruptcy Court on May 8, but judgment on the motions was reserved until after the hearings on the motions

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<sup>9</sup> Mot. to Dismiss Voluntary Pet. [Ex. # 9], Apr. 26, 2006.

<sup>10</sup> Mot. to Dismiss Involuntary Pet. [No. 06-2639, Ex. # 9], Apr. 26, 2006.

<sup>11</sup> Application of Debtor in Possession for Auth. to Employ Attorneys [Ex. # 24], May 1, 2006.

to dismiss. Thereafter, the Bankruptcy Court heard testimony on the motions to dismiss for approximately nine hours, and reserved closing argument for the next day, May 9, at 4:00 p.m. After hearing closing argument and taking a short recess to deliberate, the Bankruptcy Judge read into the record his findings of fact and conclusions of law in both cases.

In the voluntary case, the Bankruptcy Court concluded that Wilson was not authorized to file the voluntary petition on behalf of TRA LP and, therefore, dismissed the case. It found that, whether or not Wilson was a partner before the July 2005 transaction, he had no remaining interest in TRA LP or TRA LLC after the sale of Winitzky Associates and Stinson Reliant to Astral and Griffin.<sup>12</sup> After the transaction, Wilson may have remained involved in the project in some way, but he had no ownership interest in any of the entities that owned TRA LP or TRA LLC.<sup>13</sup> As a result, the Bankruptcy Court found that Wilson was not a proper party to file the voluntary bankruptcy petition and granted TRA LP's motion to dismiss.

In the involuntary case, the Bankruptcy Court found that there was a bona fide dispute as to the claims of each of the petitioning creditors and, therefore, the petition had to be dismissed. It found Wilson's testimony self-serving and incredible as to the petitioning creditors' claims. According to the Bankruptcy Court, because there was no evidence that Spano or Thomas Phillips, TRA LP's accountant, were aware of any of the petitioning creditors' claims, the other petitioning creditors did not testify at the hearing, and Wilson offered no more than his own self-serving testimony to support the alleged claims—for example, neither Gee nor Richard Wilson testified as to the services performed, amount charged, or terms under which they were to be paid—there was

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<sup>12</sup> N.T. Hr'g 5/9/06 [Ex. # 74], at 57–58.

<sup>13</sup> Id. at 58.

a bona fide dispute sufficient to require dismissal of the involuntary action.<sup>14</sup> Accordingly, he granted TRA LP's motion and dismissed the involuntary petition.

Although Koresko claimed that there was no need for the Bankruptcy Court to decide the motion for appointment as counsel for TRA LP, the Court retained jurisdiction to consider the motion and to address any motion filed by Underhill, as actual counsel for TRALP, seeking sanctions against Wilson, the other petitioning creditors, or Koresko.<sup>15</sup> A hearing on the motion for appointment of counsel was scheduled for May 15, 2006.

At the May 15 hearing, Koresko stated that the application was moot and that he "would withdraw it pending" the probability that he could not represent TRA LP "in the absence of a finding in the future that [he] was [not] in a position of conflict" when he filed the application.<sup>16</sup> Because Koresko's offer to withdraw the motion was qualified, the Bankruptcy Court decided nonetheless to consider the motion pending, take it under advisement,<sup>17</sup> and issue a ruling. The next day, May 16, the Bankruptcy Court issued an order denying the motion and outlining its reasons for barring Koresko from being appointed counsel to TRA LP.<sup>18</sup> It noted that the issue was not moot because "debtor, TRA, LP, faces the possibility of defending against a request for sanctions . . . [and an] appeal from our May 9, 2006, Bench Order and decision, either of which events would require the efforts and attention of counsel."<sup>19</sup> The order also prohibited Koresko "from representing TRA,

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<sup>14</sup> Id. at 82–87, 90.

<sup>15</sup> Id. at 99–100, 103–04.

<sup>16</sup> N.T. Application Hr'g 5/15/06 [Ex. # 75], at 2.

<sup>17</sup> Id. at 8.

<sup>18</sup> Order Den. Mot. to Appoint as Counsel [Ex. # 47], May 16, 2006.

<sup>19</sup> Id. at 5.

LP, in any matter whatsoever without further order and permission of [the] Court.”<sup>20</sup>

On May 18, 2006, Koresko filed, on behalf of all of his clients, a motion to reconsider all of the Bankruptcy Court’s prior orders in the voluntary case.<sup>21</sup> That same day he also filed a motion to strike or modify the May 16 Order denying the application for authority to employ the Koresko Law Firm as attorneys for the debtor-in-possession in the voluntary case. The next day, he filed a motion to reconsider the Bankruptcy Court’s prior orders in the involuntary case.<sup>22</sup> All of these motions were denied on May 19, 2006. Also on May 19, the Bankruptcy Court entered an order extending the deadline by which Underhill was to file any motions for sanctions until June 20, 2006. On May 19 and May 23, Koresko filed notices of appeal as to all of the Bankruptcy Court’s prior orders in the case on behalf of all of his clients—Wilson, Gee, Richard Wilson, Stinson Reliant—and himself.<sup>23</sup> In these appeals, Koresko challenges the Bankruptcy Court’s Orders of May 9, 16, and 19. By Order of this Court, the appeals were consolidated under the current civil action number, 06-2637.

On May 30, 2006, the Bankruptcy Court issued a Supplemental Memorandum Opinion supporting its May 9 Bench and Written Orders denying Koresko’s motion to rescind or extend the May 8 hearing.<sup>24</sup> This Opinion did not independently render any judgment; rather, it

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<sup>20</sup> Id.

<sup>21</sup> Mot. to Reconsider, Bankr. No. 06-20670 [Bankr. Doc. # 66].

<sup>22</sup> Mot. to Reconsider, Bankr. No. 06-20469 [Bankr. Doc. # 52].

<sup>23</sup> Those appeals, of which there were seven, were docketed in this Court under Nos. 06-2637, 06-2638, 06-2639, 06-2640, 06-2641, 06-2642, 06-2643.

<sup>24</sup> In re Tobacco Road Assocs., L.P., Nos. 06-20470 & 06-20469, 2006 WL 1997405 (Bankr. E.D. Pa. May 30, 2006).

further articulated the Bankruptcy Court's reasoning for denying the motion on May 9.

On May 31, the Bankruptcy Court issued a Supplemental Order in further support of its May 16 Order denying the application to appoint the Koresko Law Firm as counsel for the alleged debtor-in-possession. Even though the supplemental filing sought only to further articulate the Bankruptcy Court's rationale for denying the application, Koresko filed Notices of Appeal to the Supplemental Order on June 9. Those appeals were eventually docketed in this Court and consolidated with the previously filed appeals.<sup>25</sup>

On June 19, the Bankruptcy Court entered an order continuing the date by which Underhill was required to file a request for sanctions until this Court entered its final judgment in the numerous pending appeals.<sup>26</sup> On June 30, Koresko responded by filing Notices of Appeal of the order on behalf of all of his clients and himself. Those five appeals were docketed in this Court and later consolidated with the previously filed appeals.<sup>27</sup>

All fourteen appeals are now ready for review.<sup>28</sup>

## **II. STANDARD OF REVIEW**

On an appeal, the Court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree[,] or remand with instructions for further proceedings. Findings of fact,

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<sup>25</sup> The second set of appeals were originally docketed under Nos. 06-3299 and 06-3301, and later consolidated under No. 06-2637.

<sup>26</sup> Order Continuing Deadline [No. 06-3319, Ex. # 3], June 19, 2006.

<sup>27</sup> The third set of appeals were originally docketed under Nos. 06-3318, 06-3319, 06-3320, 06-3321, and 06-3322, and later consolidated with the other appeals under No. 06-2637.

<sup>28</sup> Since all of the appeals were filed, and while the Court has been reviewing this matter, the Appellee has been unable to advance its plan to convert the warehouse to condominiums. While no official stay is in place, the East Hempfield Township Board of Supervisors has been understandably unwilling to grant final approval of the plan until this matter has been resolved. As a result, the warehouse has sat idle for several months awaiting the outcome of these appeals, despite repeated attempts by Appellee to push the project forward.

whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.”<sup>29</sup> This Court may conduct a plenary review of any conclusions of law.<sup>30</sup> Discretionary decisions must be reviewed for abuse of discretion.<sup>31</sup>

### III. DISCUSSION

In the various briefs supporting their fourteen appeals, Appellants present at least 21 issues for this Court to consider on appeal. Those issues generally fall into the following categories:

- (A) the ultimate issue of whether the Bankruptcy Court erred in granting the motions to dismiss by
  - (1) applying incorrect legal standards in the proceedings,
  - (2) finding that Wilson did not have any ownership interest in TRA LP despite the evidence presented concerning common-law joint venture, fiduciary duty, and mutual mistake, and
  - (3) finding a bona fide dispute as to liability and amount of the petitioning creditors’ claims;
- (B) whether the Bankruptcy Court committed procedural errors by holding the hearing on an expedited schedule;
- (C) whether the Bankruptcy Court demonstrated bias and judicial intemperance so outrageous as to require reversal of the Court’s rulings;
- (D) whether the Bankruptcy Court erred by ruling on the application for

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<sup>29</sup> Fed. R. Bankr. P. 8013. Despite the explicit dictate of Federal Rule of Bankruptcy Procedure 8010(a)(1)(C) and (a)(2)—which require the parties to include in their briefs a statement of the applicable standard of appellate review—the parties have failed to state the applicable standard of review for any of the orders challenged in these appeals. The standard is, fortunately, clearly articulated in the Federal Rules of Bankruptcy Procedure and in Third Circuit decisional law.

<sup>30</sup> Meridian Bank v. Alten, 958 F.2d 1226, 1229 (3d Cir. 1992) (citing In re Sharon Steel Corp., 871 F.2d 1217, 1222 (3d Cir. 1981)).

<sup>31</sup> See In re Mintz, 434 F.3d 222, 227 (3d Cir. 2006).

employment as counsel after the motions to dismiss had been granted; and

- (E) whether the Bankruptcy Court erred when it issued its May 19 and June 19 Orders continuing the deadline for TRA LP to file any motions for sanctions.

### **A. Motions to Dismiss**

The ultimate issue on appeal is whether or not the Bankruptcy Court erred by granting TRA LP's motions to dismiss the bankruptcy petitions. Appellants claim that the Bankruptcy Court committed errors of fact and law in dismissing the cases, including:

- (1) failing to apply the traditional Rule 56 summary-judgment standard to both motions to dismiss;
- (2) failing to apply the principles of common-law joint venture in order to determine that Spano and Wilson were in a fiduciary relationship;
- (3) failing to apply fiduciary-duty law to determine the validity of the July 2005 transaction;
- (4) incorrectly applying contract law by ignoring a typographical error in the sales agreement that, according to Appellant, renders it void; and
- (5) improperly deciding non-core issues rather than proposing findings of fact and conclusions of law on those issues.

#### **1. Failure to Apply the Appropriate Legal Standards**

Appellants argue that the Bankruptcy Court treated the motions to dismiss as Rule 56 motions for summary judgment, but erred by failing to apply that standard to the motions.<sup>32</sup> According to Appellants, this is a fatal flaw that requires reversal of the orders dismissing the

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<sup>32</sup> Appellants misstate the Bankruptcy Court's approach to the motions to dismiss. At the outset of the May 8 hearing, the Bankruptcy Judge did not state that he would be applying a summary-judgment standard to both motions. He did reference the summary-judgment standard when referring to the motion to dismiss the involuntary petition, but did not make a similar statement about the voluntary petition. Furthermore, Appellants' blanket statement that the Bankruptcy Court treated the motions to dismiss as motions for summary judgment, focuses solely on the Bankruptcy Judge's statements at the beginning of the May 8 proceeding and ignores the standards actually applied at the close of the proceedings. Nonetheless, the Court will address Appellants' argument as it applies to the actual circumstances of the proceedings below.

petitions.

*a. Motion to Dismiss the Involuntary Petition*

The majority of Appellants' argument that the Bankruptcy Court applied the incorrect standard to the motions to dismiss is aimed at the motion in the involuntary case. Appellants insist that the Bankruptcy Court was required to apply the traditional standard applicable to a Rule 56 summary-judgment motion. The Court disagrees.

*i. Applicable Law*

A proceeding related to a contested involuntary petition is to be treated as a contested matter,<sup>33</sup> and is not subject to trial by jury.<sup>34</sup> A contested involuntary petition can survive a motion to dismiss only if the petitioning creditors' claims are "not contingent as to liability or the subject of a bona fide dispute."<sup>35</sup> If the alleged debtor controverts the petitioning creditors' claims in a timely fashion, the Bankruptcy Court must decide whether the creditors' claims are the subject of a bona fide dispute and, if they are, must dismiss the petition.<sup>36</sup> As the Third Circuit Court of Appeals has previously explained, the standard for determining whether there is a bona fide dispute

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<sup>33</sup> See 6 *Norton Bankr. L. & Prac. 2d* § 138:5 (Dec. 2006) (citing Fed. R. Bankr. P. 1018); *id.* § 138:7.

<sup>34</sup> See 9 *Norton Bankr. L. & Prac. 2d* Fed. R. Bankr. P. 1018 (Mar. 2007) ("A contested involuntary case is not treated as an adversary proceeding under the Rules. This was done in recognition of the fact that a speedy resolution of a contested involuntary case is in the best interest of not only the petitioners, but also the debtor, and that the delays which are unavoidable and usually attendant of ordinary civil cases and in adversary proceedings in the bankruptcy court, would defeat the policy aim of the Code, which is a speedy disposition of an involuntary case. . . . A contested involuntary case is tried without a jury. Accordingly, the court is required to make findings of fact and conclusions of law.").

<sup>35</sup> See 11 U.S.C. §§ 303(b)(1), 303(h)(1) (2000); *B.D.W. Assocs., Inc. v. Busy Beaver Bldg. Ctrs., Inc.*, 865 F.2d 65, 66 (3d Cir. 1989).

<sup>36</sup> *B.D.W. Assocs.*, 865 F.2d at 66.

is analogous to a reverse summary-judgment standard.<sup>37</sup> ““If there is a genuine issue of a material fact that bears upon the debtor’s liability, . . . then the petition must be dismissed,””<sup>38</sup> so long as the factual questions are “substantial.”<sup>39</sup>

ii. Discussion

No matter what interpretation Appellants give to the Bankruptcy Judge’s statements made at the beginning of the May 8 proceeding, it cannot be disputed that he applied the correct standard when he entered his findings and conclusions into the record on May 9. His statements at the beginning of the proceeding are irrelevant and have no import on the standard he actually applied when he rendered his decision on the involuntary petition. At the time he read his decisions into the record, the Bankruptcy Judge specifically referenced the Third Circuit’s decision in B.D.W. Associates, and the standard announced therein, and noted that this was the applicable standard:

[Under] B.D.W. Associates v. Busy Beaver[,] . . . the way to determine a bona fide dispute in a 303(b)(1) issue, in a petitioning creditor issue, is if there is a genuine issue of material fact . . . on the debtor’s liability or meritorious contention about the application of law to undisputed facts—so it’s not the latter, we’re not talking about application of law to undisputed facts, we’re talking about an issue of material fact—then the petition must be dismissed.<sup>40</sup>

In making his findings of fact in the involuntary case, the Bankruptcy Judge found that there were factual disputes about whether or not the petitioning creditors were actually owed what they claimed

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<sup>37</sup> See id.

<sup>38</sup> Id. at 66–67 (quoting In re Lough, 57 B.R. 993 (Bankr. E.D. Mich. 1986)).

<sup>39</sup> Id. (adopting the standard set forth by the Seventh Circuit Court of Appeals in In re Busick, 831 F.2d 745 (7th Cir. 1987)).

<sup>40</sup> N.T. Hr’g 5/9/06, at 90–91.

they were owed, or if they were owed anything at all.<sup>41</sup> Accordingly, the Bankruptcy Judge dismissed the involuntary petition, because the Bankruptcy Court is not the correct venue for adjudicating the disputed claims alleged by the petitioning creditors. Under the Bankruptcy Code, involuntary petitions are appropriate only when the creditors' claims are undisputed. Disputes about whether a debt is owed are best resolved in courts of general jurisdiction, under principles of contract, rather than in courts specially created to deal with bankruptcy issues. In this involuntary case, despite Appellants' fervent and repetitive arguments that the traditional Rule 56 summary-judgment standard should have been applied and that the matter should have been presented to a jury, this Court is convinced that the Bankruptcy Court correctly applied the standard announced by the Third Circuit Court of Appeals in B.D.W. Associates. The traditional Rule 56 summary-judgment standard was inapplicable in this context and reasonable inquiry into the applicable law would have revealed the appropriate standard.

*b. Motion to Dismiss the Voluntary Petition*

Appellants also question the standard applied to the motion to dismiss the voluntary petition.<sup>42</sup> They argue that the Bankruptcy Court was required to apply the traditional Rule 56 summary-judgment standard to this petition, as well.

*i. Applicable Law*

Under Federal Rule of Bankruptcy Procedure 9014, a dispute that is neither a contested involuntary petition nor identified as an adversary proceeding is to be resolved as a

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<sup>41</sup> Id. at 81–91.

<sup>42</sup> See Appellants' Br. [Doc. # 5], at 20.

contested matter.<sup>43</sup> A proceeding to dismiss a case qualifies as a contested matter.<sup>44</sup> Under Rule 9014, if the motion to dismiss “cannot be decided without deciding a disputed issue of material fact,” the Bankruptcy Court is required to give the party against whom relief is sought notice and an opportunity to be heard on the motion.<sup>45</sup> At the evidentiary hearing, witnesses may be offered with respect to disputed material factual issues, in the same manner in which they can be offered in adversary proceedings.<sup>46</sup> After the hearing, the Bankruptcy Court is to make findings of fact and conclusions of law before entering an order having the status of a judgment.<sup>47</sup>

ii. Discussion

In this case, the Bankruptcy Court followed the dictates of Rule 9014 to the letter. In accordance with Rule 9014, upon receipt of the motion to dismiss, the Bankruptcy Court scheduled a hearing and gave the parties sufficient notice so that they could compile evidence, gather witnesses, and prepare for the presentation of evidence at the hearing. After the hearing, the Bankruptcy Court issued its findings of fact and conclusions of law based on the evidence presented at the hearing, and entered an order dismissing the voluntary case based on those findings and conclusions. The Rule 56 summary-judgment standard was never applicable to the motion to dismiss the voluntary case. Consequently, the Court is not persuaded that the Bankruptcy Court committed any error in deciding the motion to dismiss the voluntary petition as a contested matter

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<sup>43</sup> See Lawrence Ponoroff & Stephen E. Snyder, Commercial Bankr. Litig. § 3:16 (2006) (citing Fed. R. Bankr. P. 9014).

<sup>44</sup> See id. (citing Fed. R. Bankr. P. 1017(f)); 6 Norton Bankr. L. & Prac. 2d § 138:5 (2006) (same); 4 Norton Bankr. L. & Prac. 2d § 82:23 (2006).

<sup>45</sup> Fed. R. Bankr. P. 9014(d) & accompanying advisory committee’s note on 2002 Amendments.

<sup>46</sup> Fed. R. Bankr. P. 9014(d).

<sup>47</sup> In re Khachikyan, 335 B.R. 121, 125–26 (B.A.P. 9th Cir. 2005).

under Rule 9014.

## 2. Failure to Apply Principles of Common-Law Joint Venture

Appellants claim that the Bankruptcy Court erred by not applying common-law joint-venture principles in order to determine that Spano owed Wilson duties as a fiduciary and, therefore, the July 2005 transaction was invalid.<sup>48</sup> Appellants' substantive argument—that is, their non-procedural argument—that the Bankruptcy Court erred in granting the motions to dismiss, is founded on the notion that Spano and Wilson were common-law joint venturers and, therefore, Spano owed Wilson fiduciary duties. As a result of this relationship, Appellants argue, the Bankruptcy Court should not have applied traditional contract law when it considered the validity of the July 2005 transaction, but rather, fiduciary-duty law. Consequently, the existence of the alleged co-venturer relationship is a threshold matter to be considered before any evaluation of Appellants' fiduciary-duty argument. In the proceedings below, the Bankruptcy Court found that no such joint venture existed.<sup>49</sup> This Court reviews that factual finding for clear error.

### *a. Applicable Law*

A joint venture is generally defined as “a special combination of two or more persons, where, in some specific venture, a profit is jointly sought without any actual partnership or corporate

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<sup>48</sup> There is no explanation as to why Appellants argue this point last in their brief since it is a necessary precursor to their argument that fiduciary-duty law applies to negate the July 2005 transaction. The Court must consider this point first because it believes that a determination about the existence or nonexistence of a common-law joint venture is logically necessary before it can consider the applicability of fiduciary-duty law.

<sup>49</sup> See N.T. Hr'g 5/9/06, at 70, 93, 95. Under Pennsylvania law, the existence or nonexistence of a joint venture is a question of fact. See, e.g., Keeler v. Int'l Harvester Used Truck Ctr., 463 A.2d 1176, 1178 (Pa. Super. Ct. 1983) (“What *constitutes* a joint venture is a question of law; but whether a joint venture *exists* is generally a question of fact.” (citing 46 Am. Jur. 2d Joint Ventures § 7)); 13A Summ. Pa. Jur. 2d Business Relationships § 19:16 (2006).

designation.”<sup>50</sup> Under Pennsylvania law,<sup>51</sup> the following factors are essential to the creation of a joint venture: (1) an express or implied contract or agreement “to engage in a common enterprise for their mutual profit”<sup>52</sup>; (2) the contribution by each party of services, skill, knowledge, materials, or money; (3) the sharing of profits among the parties; (4) a joint proprietary interest and right of mutual control over the subject matter of the enterprise; and (5) formation for the purpose of a single business transaction rather than a general and continuous transaction.<sup>53</sup> “The existence or non-existence of a joint venture depends upon what the parties intended in associating together . . . [and] on the facts and circumstances of each particular case.”<sup>54</sup> The party asserting the existence of a joint venture has the burden of proving its existence.<sup>55</sup>

*b. Discussion*

In this case, Spano never expressly or implicitly agreed to enter into a joint venture

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<sup>50</sup> McRoberts v. Phelps, 138 A.2d 439, 443 (Pa. 1958) (internal quotation omitted).

<sup>51</sup> Because the parties apparently agree that Pennsylvania law applies to this case, the events, interactions, and transactions material to the issues in this matter occurred in Pennsylvania, and in the absence of any authority that Pennsylvania law does not apply in this case, the Court will apply Pennsylvania law to the issues in this case not governed by federal law.

<sup>52</sup> Richardson v. Walsh Constr. Co., 334 F.2d 334, 336 (3d Cir. 1964) (applying Pennsylvania law).

<sup>53</sup> See McRoberts, 138 A.2d at 443–44.

<sup>54</sup> Id.; see also 12 Am. Jur. 2d Proof of Facts 295, § 2 (2006) (“As between the parties to the enterprise, intent to form a joint venture is the most basic element of the relationship. Whether the parties to a particular undertaking have created, as between themselves, the relation of joint venturers depends on their actual intent to associate themselves as such, and this is determined in accordance with the ordinary rules governing the interpretation and construction of contracts.” (internal footnotes omitted)).

<sup>55</sup> See McRoberts, 138 A.2d at 444 (“Did appellees *sustain their burden of proving that they were members of a joint venture* known as Phelps Prospecting? An examination of the record indicates an affirmative answer to this question.” (emphasis added)); see also 46 Am. Jur. 2d Joint Ventures § 71 (2007) (“The party asserting the existence of a joint venture relationship has the burden of establishing the existence of a joint venture. Such party has the burden of proving that the parties intended such a relationship and must demonstrate each of the elements of the joint venture relationship. Moreover, the party alleging the existence of a joint venture bears the burden of both alleging and proving that there is an agreement or contract supporting the relationship.” (internal footnotes omitted)).

with Wilson in which they would share profits, share equal control over the project, or work together to further a single business transaction. Evidence that Spano invested money into the project before the July 2005 transaction is not disputed. But the mere investment of money is not sufficient to create a common-law joint venture. Appellants presented evidence, consisting of Wilson's own testimony, that he desired and intended to enter into a joint venture with Spano, but there is no evidence that the same was true for Spano.<sup>56</sup> During Koresko's questioning of Spano in the voluntary case, he failed to question Spano about his intentions in entering the project, leaving the record devoid of any evidence that Spano sought such a relationship with Wilson. In fact, the evidence produced suggests that Spano never had any intention of entering a co-venturer relationship. He repeatedly rejected Wilson's proposals to create such a relationship and continued to seek a purchase agreement where he would be the sole owner of the TRA LP entities. In the absence of any evidence to the contrary, the Bankruptcy Court's finding that Spano, who is a real-estate developer, intended to ostensibly purchase the warehouse by purchasing the entities that owned the real estate rather than create a joint venture with Wilson, cannot be considered clear error. While Spano may have been interested in retaining Wilson's services related to the project, there is no evidence that he ever contemplated a co-venturer relationship with Wilson.

Additionally, Appellants did not offer any testimony that the parties had an agreement to share profits. Wilson himself admitted that no profit-sharing agreement existed at any time, although he had proposed several.<sup>57</sup> Wilson received a monetary stipend, free rent, and medical

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<sup>56</sup> In fact, it is not entirely clear that Wilson had any ownership interest in TRA LP during the approximately one-year-long period in which he claims that he and Spano were co-venturers. Nonetheless, for the purposes of this discussion only, the Court will assume that he had some ownership interest during the relevant time period.

<sup>57</sup> N.T. Hr'g 5/8/06, at 175.

insurance for his involvement in the project, but there was no sharing of profits or losses related to the alleged joint venture. Even up to the time of the July 2005 transaction, there was no agreement or vested expectation that profits would be shared, as Wilson continued to offer proposals for potential profit-sharing to which Spano would not agree.<sup>58</sup>

Moreover, no evidence was offered to establish that Wilson and Spano shared mutual control over the subject matter of the enterprise. The time leading up to the June 2005 transaction was, by Wilson's own admission, a period in which negotiations were taking place.<sup>59</sup> During this period of negotiation, the relationship between Spano and the owner(s) of TRA LP was at least somewhat adversarial, as the parties attempted to determine their business and financial relationship for the project.<sup>60</sup> The parties did not share management control during this period; Wilson continued to oversee the warehouse and Winitsky retained some involvement in the management of the project, while Spano's contribution was purely monetary. Spano simply fed money into the project to keep it afloat while he negotiated his eventual purchase and takeover of the TRA LP entities. During this negotiation period, there is no evidence that decisionmaking authority was shared equally or even at all.

Without any credible evidence suggesting that Spano entered the project with the intention of creating a relationship with the essential characteristics of a joint venture, the Bankruptcy Court did not commit clear error by finding that such a venture did not exist. In fact, if

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<sup>58</sup> See, e.g., id.

<sup>59</sup> See id.

<sup>60</sup> Even if the Court assumes that all of Appellants' unfounded allegations are true such that Winitsky was actually holding Wilson's interest in TRA LP during the negotiations, Spano and Wilson remained in an adversarial posture to one another because the ultimate purchase price paid would directly value Wilson's alleged share.

this Court were presented with the same evidence, it would be unwilling to conclude that a joint venture had been formed. Accordingly, the Court will affirm the Bankruptcy Court’s factual finding that Spano and Wilson were not co-venturers.

### **3. Failure to Apply Fiduciary-Duty Law**

Based on their argument that Spano and Wilson were implicitly joint venturers, Appellants argue that the Bankruptcy Court should have applied fiduciary-duty law rather than contract law to determine ownership of TRA LP and, consequently, whether Wilson had the authority to file a voluntary bankruptcy petition on behalf of TRA LP. This argument is applicable only if Spano and Wilson were, in fact, co-venturers such that they would have owed to one another the fiduciary duties that inhere in such a relationship. Because the Court has affirmed the Bankruptcy Court’s finding that no joint venture existed—a finding that this Court also would have made had it been the factfinder—Appellants’ only possible remaining argument is that fiduciary-duty law should have been applied even in the absence of a common-law joint-venture relationship between Spano and Wilson.<sup>61</sup>

This argument has no merit. Fiduciary-duty law does not apply in the absence of a fiduciary relationship. Appellants argument is based on the premise that a fiduciary relationship was created by the alleged joint venture. Since no joint venture existed, there is no basis on which to

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<sup>61</sup> In passing, Appellants also argue that there was sufficient evidence presented in the Bankruptcy Court that Wilson’s agent, Doris McClure, improperly conveyed his stock in Stinson Reliant to Winitsky. The significance of this point is not entirely clear to the Court. Nonetheless, while the Court will not discuss this argument in detail, it is appropriate to acknowledge Wilson’s own testimony that he authorized the transfer to Winitsky of whatever interest McClure may have held. *See* N.T. Hr’g 5/8/06, at 168–69. After being asked about the transfer, Wilson admitted that he, reluctantly or not, approved the transfer: “[T]hat was, you know, the only way I could, you know, get her out of here, get Leon out of here, and get Tom, and get going.” *Id.* at 169. He also admitted that he knew about the transfer and did not object because there was a lack of trust between him and McClure, thus the transfer to Winitsky, whom he trusted, was an acceptable alternative to a direct transfer. *Id.* at 169, 170. Eventually, Wilson ratified the transfer by signing, with full knowledge of the circumstances, the agreement in which he relinquished any ownership he may have had in TRA LP in exchange for complete ownership of Stinson Reliant.

conclude that there was a fiduciary relationship between Spano and Wilson. Obviously, Spano cannot be held to the duties of a fiduciary if he was never Wilson's fiduciary. As a result, fiduciary-duty law does not apply to the July 2005 transaction between Spano and Wilson, and the Bankruptcy Court did not err by applying contract law rather than fiduciary-duty law to determine who had the authority to file bankruptcy petitions on behalf of TRA LP.

#### **4. Incorrect Application of Contract Law**

Appellants also argue that even if contract law was applicable to determine ownership, the Bankruptcy Court incorrectly applied the law of mutual mistake in finding that the July 2005 transaction transferred all ownership in TRA LP to Spano. Their argument is based on the misspelling of the word "Enterprises" in the sales agreement. According to Appellants, because the sales agreement transferred ownership to "Astral Enterprises, LLC" and "Griffin Enterprises, LLC" as opposed to "Astral Enterprizes, LLC" and "Griffin Enterprizes, LLC," the agreement is void. Appellants make much of this substitution of an "s" for a "z," claiming that the document should be construed against its draftsmen, the typographical mistake therein is material, and the mistake renders the contract and the transaction void. Essentially, Appellants seek rescission of the contract of sale based on the alleged mutual mistake.

##### *a. Applicable Law*

An error made by the drafter of a contract, which falls into the category of a scrivener's error, is analogous to a mutual mistake "if the scrivener has made a mistake and neither of the parties realizes that the instrument does not express their true agreement."<sup>62</sup> Whether or not a party seeking rescission on the basis of a mutual mistake caused by a scrivener's error should

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<sup>62</sup> 66 Am. Jur. 2d Reformation of Instruments § 19 (2007).

receive such relief “depends upon the nature and effect of that mistake.”<sup>63</sup> In order for rescission to be an appropriate remedy, “the mistake must relate to the basis of the bargain, must materially affect the parties’ performance, and must not be one as to which the injured party bears the risk.”<sup>64</sup> On the other hand, when the contract immaterially fails to conform to or express the real agreement or intention of the parties as a result of a scrivener’s mistake, the contract may be reformed only.<sup>65</sup>

*b. Discussion*

In this case, while Wilson could certainly seek reformation of the sales agreement to correct the spelling of the Griffin and Astral entities, rescission of the contract is an excessive and unreasonable remedy in light of the obviously typographic error. All of the evidence offered at the hearing below, including the testimony of Wilson, showed that the parties to the July 2005 contract intended to transfer ownership of the TRA LP entities to the Griffin and Astral LLCs, so that Spano would ultimately be the owner of TRA LP. Wilson argues only that the transfer was invalid based on the spelling of “Enterprizes” with an “s” rather than a “z” in the sales agreement. Since both parties mistakenly presumed that the word “Enterprizes” was spelled the same in the sales agreement as it had been in the forms creating the LLCs, this is a classic example of a scrivener’s or draftsman’s mistake. As such, rescission of the contract would be appropriate only if that mistake related to the basis of the bargain and materially affected the parties’ performance of the contract. The inadvertent misspelling of “Enterprizes” is unrelated to the basis of the bargain to transfer ownership of the TRA

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<sup>63</sup> See Lanci v. Metropolitan Ins. Co., 564 A.2d 972, 974 (Pa. Super. Ct. 1989) (citing Nw. Sav. Ass’n v. Distler, 511 A.2d 824 (Pa. Super. Ct. 1986)).

<sup>64</sup> See id.; see also 27 Williston on Contracts § 70:69 (4th ed. 2006) (“To justify rescission of a contract, a mutual mistake must regard a fact that is vital to completion of [the] contract; it must be so substantial and fundamental as to defeat the object of [the] parties in making the contract.”).

<sup>65</sup> 76 C.J.S. Reformation of Instruments § 25 (2007).

LP entities, and it did not defeat the parties' object in entering the contract. Likewise, the misspelling did not materially affect the parties' performance of the contract; each seller's intent to transfer the TRA LP entities to Spano was executed in spite of the immaterial misspellings.<sup>66</sup> The remedy of rescission is, therefore, not available to Wilson, and the Bankruptcy Court did not err by rejecting Appellants' attempt at rescission on the ground of mistake. If inclined, Wilson could seek reformation of the contract to correct the misspellings, but that remedy would merely reiterate the parties' intention to enter a binding and enforceable contract transferring the TRA LP entities to Spano.

### **5. Improperly Deciding Non-Core Issues**

While Appellants do not devote any section of their brief to this argument, they repeatedly suggest that the Bankruptcy Court improperly decided non-core issues, namely whether Wilson had an ownership interest in TRA LP on the date that he filed the bankruptcy petitions.<sup>67</sup> Appellants again offer no legal support for their claim, but baldly assert that the dispute over who is a controlling partner of TRA LP is a non-core matter in which the Bankruptcy Court was not permitted to make any ultimate decisions or enter final orders.

#### *a. Applicable Law*

Pursuant to 28 U.S.C. § 157, district courts can refer bankruptcy cases and proceedings to the bankruptcy court for the district.<sup>68</sup> Bankruptcy judges may hear and determine

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<sup>66</sup> It is not as if there were no entities to accept the interests in TRA LP at the time of the transaction. Having been created in May 2005, the Griffin and Astral LLCs were in existence at the time that the sales agreement was signed by all parties, including Wilson. Despite the misspellings, the interests were transferred at the time of the July 2005 transaction in accordance with the intent of all the parties involved.

<sup>67</sup> See Appellants' Br. [Doc. # 5], at 8, 13, 20, 23, 30, 31, 35.

<sup>68</sup> 28 U.S.C. § 157(a) (2000).

all Title 11 cases and core proceedings referred to them by the district courts and may enter appropriate orders and judgments, subject to the review of the district court under 28 U.S.C. § 158.<sup>69</sup> The statute includes a non-exhaustive list of core proceedings, including “matters concerning the administration of the estate” and “other proceedings affecting liquidation of the assets of the estate.”<sup>70</sup> In addition to those explicitly listed, “a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.”<sup>71</sup> It has also been held that “a proceeding is core if it is ‘so logically connected’ to an issue in the bankruptcy case that judicial economy and fairness dictate that they be decided in the same forum.”<sup>72</sup> “A proceeding can be core by its nature when either the type of proceeding is unique to, or uniquely affected by, the bankruptcy proceeding or the proceeding directly affects the core bankruptcy function.”<sup>73</sup> Designation of a proceeding as core or non-core does not impair the bankruptcy court’s jurisdiction to hear the proceeding: bankruptcy judges may also hear non-core proceedings referred by the district court, but may only submit proposed findings of fact and conclusions of law to the district court for final judgment.<sup>74</sup>

*b. Discussion*

In this case, the issues decided by the Bankruptcy Court—particularly the issues of whether Wilson had authority to file bankruptcy petitions on behalf of TRA LP and, subsequently,

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<sup>69</sup> Id. § 157(b)(1).

<sup>70</sup> See id. §§ 157(b)(2)(A), (O).

<sup>71</sup> CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 196 (3d Cir. 1999) (internal quotation omitted).

<sup>72</sup> 8A C.J.S. Bankr. § 164 (2007) (citing In re Lombard-Wall Inc., 48 B.R. 986 (S.D.N.Y. 1985)).

<sup>73</sup> 9 Am. Jur. 2d Bankr. § 753 (2007) (citing to In re Petrie Retail, Inc., 304 F.3d 223 (2d Cir. 2002)).

<sup>74</sup> 28 U.S.C. § 157(c)(1).

whether the petitions should be dismissed—were core, and the proceeding to consider TRA LP’s motions to dismiss was a core proceeding. Accordingly, the Bankruptcy Court properly decided the core issues and entered final orders dismissing the petitions.

There is no right under the Bankruptcy Code more substantive and fundamental than the right to bankruptcy relief itself. The issue of whether a person has the authority to file a bankruptcy petition on behalf of an entity is one that “could arise only in the context of a bankruptcy case” and “is ‘so logically connected’ to . . . the bankruptcy case that judicial economy and fairness dictate that” it be decided in the same forum as, and by the judge overseeing, the bankruptcy case itself. Additionally, the proceeding to determine filing authority was one that “directly affect[ed] the core bankruptcy function” in that its primary purpose was to establish whether or not the protective, restrictive, and supervisory provisions of the bankruptcy regime were applicable to the entity alleged to be a debtor under Title 11. Moreover, the determination of filing authority is certainly a “matter[] concerning the administration of the estate”<sup>75</sup> as it dictates whether or not a bankruptcy estate even exists, and is analogous to several of the other matters explicitly listed under 28 U.S.C. § 157(b)(2).<sup>76</sup> Consequently, the Court is convinced that the proceedings below were core and that the Bankruptcy Court committed no error by entering final orders on the motions to dismiss.<sup>77</sup>

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<sup>75</sup> Id. § 157(b)(2)(A).

<sup>76</sup> See id. §§ 157(b)(2)(G), (K), (O).

<sup>77</sup> **Additionally, the Court notes that even if some or all of the issues were non-core, the entering of final orders would be considered harmless error because this Court would adopt the Bankruptcy Court’s findings and conclusions, and enter an Order embracing them.**

## **B. Expedited Schedule**

In addition to their substantive arguments challenging the orders granting dismissal, Appellants also challenge the Bankruptcy Court's implementation of an expedited schedule to decide the motions to dismiss. They claim that forcing the matter to a full hearing on ten-days' notice, especially in light of their motion for an extension or continuance, deprived them of their due-process rights and constituted reversible error.

### **1. Applicable Law**

Under Local Bankruptcy Rule 5070-1(f), a moving party who desires a hearing date earlier than that which would normally be assigned may move for expedited consideration of its substantive motion, and the Court may set an expedited schedule without a hearing under Local Bankruptcy Rule 9014-2. In the case of a contested involuntary petition, the Bankruptcy Court must "determine the issues of [the] contested petition at the earliest practicable time,"<sup>78</sup> and an expedited schedule is often desirable and appropriate.<sup>79</sup> The decision to grant or deny a motion for expedited consideration is within the Court's discretion; it is to be made based on the motion and may be made without an answer or, as mentioned above, a hearing.<sup>80</sup> Likewise, whether to continue or extend the expedited schedule is a decision within the discretion of the court, to be exercised in a sound and reasonable manner.<sup>81</sup> A bankruptcy judge's decision to set an expedited schedule and/or deny a

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<sup>78</sup> Fed. R. Bankr. P. 1013.

<sup>79</sup> See Lawrence Ponoroff & Stephen E. Snyder, Commercial Bankr. Litig. § 5:21 (2006)

<sup>80</sup> Local Bankr. R. 9014-2(a)(7), (d), & Source Note.

<sup>81</sup> See Concerned Citizens of Bushkill Twp. v. Costle, 592 F.2d 164, 172 (3d Cir. 1979) (citing Landis v. N. Am. Co., 299 U.S. 248, 254–56 (1936), and Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3d Cir. 1950)) (discussing a trial judge's discretion in deciding a motion for a continuance); 33 Fed. Proc., L. Ed. § 77:28 (2006).

motion to continue that schedule must, therefore, be reviewed for abuse of discretion.<sup>82</sup>

## 2. Discussion

### *a. Denial of the Motion to Rescind or Extend*

Appellants argue that the Bankruptcy Court committed reversible error by scheduling an expedited hearing on the motions to dismiss, and by not granting their motion to rescind or extend the hearing, because no exigent circumstances existed and no evidence was presented that TRA LP would suffer irreparable harm or be prejudiced if the hearings had been scheduled in the normal course. Appellants fail, however, to cite to a single rule, statute, or case that even implicitly requires any such showing be made. Nothing in the Local Rules or Federal Rules of Bankruptcy Procedure require the Bankruptcy Court to deny a motion for expedited scheduling in the absence of certain proof. While the Local Rules outline the suggested contents of such a motion, they do not limit the Bankruptcy Court in its determination as to the motion's merits.

In this case, the Bankruptcy Court granted TRA LP's motion for an expedited hearing and scheduled a hearing for May 8, without a hearing on the scheduling motion. This was wholly appropriate under Local Bankruptcy Rule 5070-1(f). When Appellants filed a motion to rescind or extend the expedited schedule, the Bankruptcy Court scheduled a hearing, to precede the hearing on the motions to dismiss, at which Appellants were given the opportunity to explain why they needed more time to collect materials for their case. At that hearing, Appellants were specifically asked what benefits they would secure if given additional time—that is, the additional week or week-and-a-

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<sup>82</sup> 33 Fed. Proc., L. Ed. § 77:28 (2006). A decision to deny a requested continuance will constitute error only if it is made arbitrarily or capriciously. See id.

half that they would receive if the hearing was scheduled in the ordinary course.<sup>83</sup>

In the involuntary case, the only additional materials that Appellants sought were records that may have identified other potential petitioning creditors<sup>84</sup> and shown that TRA LP was not paying its bills as they came due,<sup>85</sup> and affidavits in which the named creditors would swear that they had not been paid.<sup>86</sup> Essentially, Appellants wanted more time in the involuntary case to conduct a fishing expedition for some other unknown potential creditors, in case TRA LP was able to successfully counter the claims of the three petitioning creditors,<sup>87</sup> and to secure affidavits that would be duplicative of evidence that they were already prepared to present.<sup>88</sup>

In the voluntary case, Appellants claimed that they needed more time to secure witnesses who would testify that they had dealt with Wilson as a partner in TRA LP sometime in the past.<sup>89</sup> Additionally, they claimed that an extension of time would enable them to subpoena Spano's attorney, Sullivan, and his file, and that somehow the information in that file would be discoverable, despite the attorney-client privilege, under the crime-fraud exception. Any other evidence that they

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<sup>83</sup> N.T. Hr'g 5/8/06, at 37.

<sup>84</sup> Id. at 23, 30.

<sup>85</sup> Id. at 30, 31.

<sup>86</sup> Id. at 31.

<sup>87</sup> Id. at 30 (“[T]o the extent that they are successful in countering the claim of the petitioning creditors, the Court can still . . . take jurisdiction of the bankruptcy if it comes to the Court’s attention that there are other creditors that are out there . . .”).

<sup>88</sup> Id. at 31 (“And we have reason to believe that they are not paid, because we have letters saying they weren’t paid, which is another pile over here, but it will be much clearer, we believe, for the Court to have an affidavit from the party who hasn’t been paid . . .”).

<sup>89</sup> Id. at 32.

would hope to secure in the additional time would, by their own admission, be cumulative.<sup>90</sup>

After hearing Appellants' argument, the Bankruptcy Judge reserved ruling on the motion to rescind or extend until hearing the evidence on the motions to dismiss, in order to determine if an extension was necessary. Specifically, he noted that he would pay careful attention to those factual issues for which Appellants claimed they needed additional time to develop evidence, in order to determine whether additional evidence would be beneficial to their offer of proof.<sup>91</sup> Accordingly, even though he was not required to reserve his decision, he did so in order to evaluate the current status of Appellants' claims before determining if additional time would allow them to bolster their case.

After hearing testimony and argument on the motions to dismiss, the Bankruptcy Court dismissed the motion to rescind or extend as moot. The Bankruptcy Court later bolstered this ruling with a supplemental opinion in which it explained that it also had considered the motion withdrawn because Koresko failed to make any argument on the motion on May 9.

This Court sees no error in the Bankruptcy Court's scheduling of the matter or any rulings made related thereto. Appellants, by simultaneously filing both a voluntary and involuntary bankruptcy petition, inevitably crippled TRA LP while the petitions were pending. Through mechanisms such as the automatic stay provision of 11 U.S.C. § 362, bankruptcy law prohibits certain activity necessary to the profitability of a project, especially one that is based entirely on improving a piece of property owned by the alleged debtor. When there is a real and valid dispute

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<sup>90</sup> Id. at 37 (“I don’t suppose that there’s much more that Mr. Wilson can’t testify to. A lot of it would be cumulative as to the number of people that regard him as a partner, both in the pre[-] and post[-]transaction setting. If Your Honor doesn’t want cumulative evidence, then . . .”).

<sup>91</sup> Id. at 42.

as to whether the petitioners, in a voluntary or an involuntary bankruptcy, have the authority to file petitions, an expeditious resolution of the dispute is absolutely necessary.<sup>92</sup> In this case, any improvement or further development of the warehouse was halted by the filing of the bankruptcy petitions, and there was a real dispute about whether Wilson had any authority to file the petitions either as a general partner or a petitioning creditor of the debtor. Accordingly, expeditious resolution of the dispute was appropriate.

Considering the reasons that Appellants stated in support of their need for an extension, as well as the evidence presented on May 8, denying the request for a continuance was a sound and reasonable exercise of the Bankruptcy Court's discretion. The Bankruptcy Court determined that additional time would not be beneficial and was, therefore, unnecessary because the additional evidence sought was not material to the outcome of the motions to dismiss. This Court agrees with the Bankruptcy Court's determination. For example, the collection of records to prove that TRA LP was not paying its bills in the ordinary course would have been fruitless. Whether TRA LP was paying its bills in the ordinary course was never a material issue in the Bankruptcy Court. Because the involuntary petition was controverted and TRA LP was able to establish a bona fide dispute as to liability or amount, the petition had to be dismissed before the Bankruptcy Court was ever required to contend with the payment of debts in the ordinary course. This is a matter that

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<sup>92</sup> As two bankruptcy commentators note,

[b]ecause of the chilling effect that the pendency of an involuntary petition is likely to have on the continued operation of the debtor's business notwithstanding the protections afforded by Section 303(f), the debtor will normally want to expedite pretrial discovery and motion hearings in order to proceed with trial as quickly as possible. In recognition of this concern, the court is required to conduct a trial of the contested issues in an involuntary case at "the earliest practicable time."

Ponoroff & Snyder, Commercial Bankr. Litig. § 5:21 (2006) (quoting Fed. R. Bankr. P. 1013(a)).

A voluntary petition, if filed by a party whose authority to do so is disputed, presents many of the same problems as a contested involuntary petition and, therefore, should be considered as expeditiously as possible.

becomes relevant only when it is first determined that there is no dispute regarding the claims of the petitioning creditors. Accordingly, Appellants could not expect to be granted more time to obtain documentary proof that “bills were not being paid as they came due”<sup>93</sup> when that issue was never relevant to the motions to dismiss.

Furthermore, whether some members of the community, or of businesses that provided services for TRA LP, believed that Wilson was a general partner is irrelevant to the issue of whether Wilson had any actual interest in TRA LP. While a person may be held liable as a partner if he represents himself as such to the community,<sup>94</sup> he cannot gain the benefits of partnership simply by holding himself out as a partner. The result of allowing a person to reap the benefits of dealing with others as if one were a partner when, in fact, one is not, is absurd. For instance, allowing a person to claim partnership status in the Koresko Law Firm—and thereby obtain ownership status and share in its profits—merely by telling others that he is a partner and dealing with others as if he were, is unthinkable. Moreover, Appellants could have paraded in dozens of witnesses to testify that they believed Wilson was a partner in TRA LP, but no number of witnesses would have overcome the concrete evidence of the July 2005 sales agreement and release in which Wilson relinquished any ownership interest he may have had. Consequently, Appellants were not prejudiced by not being able to offer the testimony of those in the community to whom Wilson held himself out as a partner in TRA LP.

Additionally, the Court is generally opposed to allowing a party to raid the private

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<sup>93</sup> N.T. Hr’g 5/8/06, at 25 (“I wanted [the records] to show that bills were not being paid as they came due.”).

<sup>94</sup> See, e.g., 15 Pa. Cons. Stat. Ann. § 8328(a) (West 1995).

case file of an adverse party's attorney. Under exceptional circumstances, the Court may consider a request limited to nonprivileged documents, but, in this case, Appellants' desire to subpoena Sullivan's case file would not be grounds for extending the time for discovery before the hearing. Appellants admitted that the case file was not a necessary part of their case and that they could establish their case without it.<sup>95</sup>

Finally, despite their argument to the contrary, a continuance would not have benefitted Appellants' case by allowing them to present the testimony of the other petitioning creditors in support of the alleged debts and to bolster Wilson's testimony. Koresko specifically announced at the hearing that he had never planned on presenting the testimony of any petitioning creditor other than Wilson. He stated that he had "made a strategic decision and Mr. Wilson was the only competent witness to testify as to whether or not the amounts were owed."<sup>96</sup> He also claimed that he had "made a strategic choice for [Gee] not to be [at the hearing]."<sup>97</sup> Almost certainly, then, the other petitioning creditors would not have appeared at the hearing no matter when it was scheduled, because Koresko had previously decided that they should not appear. Consequently, the Court finds Appellants' argument that the expedited schedule deprived them of the opportunity to present the other petitioning creditors' testimony disingenuous and wholly unconvincing.

This Court must determine only whether the Bankruptcy Court's denial of the motion constituted abuse of its discretion. Because this Court agrees that the additional evidence sought would have provided minimal benefit to Appellants' case, if any, and in the absence of any evidence

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<sup>95</sup> N.T. Hr'g 5/8/06, at 36 ("I think we can . . . get there without it.").

<sup>96</sup> Id. at 309.

<sup>97</sup> Id. at 311.

that the Bankruptcy Court acted arbitrarily or capriciously, the Court concludes that the Bankruptcy Court did not abuse its discretion by denying the motion to rescind or extend the expedited schedule.

*b. Reserving the Ruling*

Appellants vehemently deride the Bankruptcy Court for reserving his ruling on their motion to rescind or extend until after the hearings on the motions to dismiss. Their argument, however, lacks any legal basis or support. They argue that “it is simply illogical to conduct expedited hearings while holding the Objection to the hearings in abeyance,” and that “[c]ommon sense dictates that the court conduct a hearing and rule on the Objection to the expedited hearing prior to actually holding the expedited hearing.”<sup>98</sup> This Court disagrees. Given Appellants’ meager arguments for additional time during the May 8 hearing on their extension motion, it was within the Bankruptcy Court’s discretion to reserve its ruling until after it could evaluate the strength of Appellants’ cases and the probability that additional time would improve Appellants’ likelihood of success, if they were initially unsuccessful. Since Appellants cite absolutely no law in support of their bald assertions of abuse of discretion and mistake of law, and because the approach is a logical one under these unique circumstances, the Court does not find that the Bankruptcy Court committed reversible error by reserving its decision on the motion until after the hearing on the motions to dismiss.

*c. The May 30 Supplemental Opinion*

Appellants also attack the Bankruptcy Court’s May 30 supplemental memorandum opinion, which included a further explanation of its rationale for denying Appellants’ motion to rescind or extend the expedited schedule. In so doing, Appellants claim that the Bankruptcy Court

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<sup>98</sup> Appellants’ Br. [Doc. # 5], at 15.

had no authority to issue “a substantive ruling on (1) a motion that he previously deemed moot; and (2) a motion on which no hearing was held.”<sup>99</sup> The Court disagrees.

First, Appellants’ claim that a hearing was not held on the motion is grossly disingenuous. A hearing was scheduled and held on May 8, at which Appellants were provided more than ample opportunity to argue in support of their position that more time was necessary to gather essential evidence.<sup>100</sup> During the May 8 hearing on the motion, the Bankruptcy Judge explicitly and repeatedly questioned Appellants about why they needed additional time and what more they expected to discover if the hearing were to be rescheduled.<sup>101</sup> Appellants also had the opportunity to demonstrate their need for additional time throughout the hearing on the motions to dismiss and during their closing arguments the following day, May 9. A simple glance at the transcript reveals that the Bankruptcy Court held a hearing on the motion. Appellants’ claim that a hearing was not held is a flagrant distortion of the record.

Second, the Bankruptcy Court was well within its authority under Local Bankruptcy Rule 8001-1(b) to issue a supplemental opinion to support its denial of the motion from the bench on May 9. That rule permits the filing of a written supplemental opinion that amplifies an earlier

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<sup>99</sup> Id. at 16.

<sup>100</sup> See N.T. Hr’g 5/8/06, at 20–42.

<sup>101</sup> See, e.g., id. at 22 (“Okay. Then tell me . . . what you need – who you need to be here?”); id. at 31 (“In the involuntary, 469, what other information do you need? What more time do you need?”); id. at 32 (“In the voluntary, what information do you need to get that you have not been able to get to come in here this afternoon?”); id. at 35 (“Other than getting folks that are outside TRA that may or may not say that they’re partners . . . in his venture or some other venture, what do you need more time to bring in on the voluntary?”); id. at 36–37 (“[W]hat other evidence do you need for the voluntary hearing that you don’t – that you need more time? And if this – you ask that this be scheduled in the ordinary course. That would be another week and a half or two weeks. And, so, that’s all we’re talking about on that time. So, it’s evidence. It’s material that you would be able to get in that time, because that’s the time frame that you asked for. You asked that it be reconsidered to be the time that it would be in the ordinary course of a motion filed on the 26th of April.”); id. at 37 (“What other evidence do you need more time to bring in?”); id. at 40 (“Hold that, because I want to find out what more you need. . . .”).

recorded oral bench order within 15 days of the filing of a notice of appeal of the order. The Bankruptcy Court complied with the rule when it issued the supplemental opinion that further explicated its rationale for denying the motion to rescind or extend the expedited schedule. Even if the opinion was filed in error, which it was not, Appellants were in no way prejudiced by the filing and cannot seek reversal of the May 9 Order based on the opinion that was allegedly issued in violation of the Local Bankruptcy Rules.

*d. Conclusion*

Overall, Appellants have not convinced this Court that the Bankruptcy Court abused its discretion by setting an expedited schedule for the consideration of these matters and by denying Appellants' motion to rescind or extend the schedule. Both voluntary and involuntary petitions exact great hardships on alleged debtors, and the expeditious resolution of disputes concerning the validity of such petitions is preferable, if not necessary. Under the circumstances that the Bankruptcy Court faced in these unique cases, it was well within its sound discretion to consider the matters on an expedited schedule and, as a result, this Court will not reverse its ruling. Likewise, the Court cannot find that the Bankruptcy Court abused its discretion by reserving its ruling until May 9. Nor can the Court find that the Bankruptcy Court committed any error by issuing its supplemental opinion.

**C. Judicial Bias and Intemperance**

From the very start of this matter, Appellants have questioned the Bankruptcy Judge's impartiality, yet they never sought his recusal. Their accusations were first offered in the brief supporting their motion to withdraw the reference. In that brief, Appellants claimed, without providing any basis for their allegations, that the Bankruptcy Judge was biased against them, and that he demonstrated his bias by granting an expedited hearing and refusing to rescind or extend the

expedited schedule.<sup>102</sup> On appeal, Appellants have renewed and extended these accusations. They now claim that the Bankruptcy Judge’s prior affiliation with a large law firm and his statement that small firms often have difficulty handling Chapter 11 cases, clearly indicate that he intended to prevent a reasonable presentation of Appellants’ case.<sup>103</sup> In fact, Appellants attack the Bankruptcy Judge personally, comparing him to his predecessor and implying inferiority. Appellants also argue that the Bankruptcy Judge’s bias was obvious from his raising objections *sua sponte*, interrupting Koresko during questioning and argument, and cross-examining witnesses from the bench. Appellants further claim that the Bankruptcy Judge “exhibited judicial intemperance of the highest order” when dealing with Koresko and his associate, Jeanne Bonney. In the midst of touting his own previous novel representation in bankruptcy courts, Koresko also claims numerous other alleged instances of bias and/or intemperance, most of which are actually unrelated to bias.<sup>104</sup> Those that are related to bias challenge the Bankruptcy Judge’s judicial rulings, with which Appellants disagree. It is unnecessary for the Court to recite all of these claims herein.

It is significant to note that, during their extensive recitation of the allegedly biased conduct, Appellants fail to cite a single legal authority, statutory or decisional, supporting their argument. Additionally, they fail to state the statutory provision on which their argument is based, or articulate the specific remedy they seek from this Court. Because Appellants did not move to

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<sup>102</sup> Br. in Support of Mot. for Withdrawal of the Reference [Ex. # 30], at 6 (while Appellants failed to number the pages of their brief, the accusations of bias are made on the sixth page of the brief).

<sup>103</sup> Appellants’ Br. [Doc. #5], at 22.

<sup>104</sup> For instance, Appellants argue that the Bankruptcy Judge “abused his discretion” by conducting the hearing “without regard to the interests of the parties, their counsel, the court staff or his own fatigue.” Appellants’ Br. [Doc. # 5], at 24. Such a statement may support some due-process argument, but it certainly does not support an argument for bias, since Appellants acknowledge that all participants were equally affected by the manner in which the hearing was conducted.

have the Bankruptcy Judge disqualified below, the Court must assume that Appellants demand reversal of the Bankruptcy Judge's orders based on his failure to disqualify himself *sua sponte* under 28 U.S.C. § 455.

*a. Applicable Law*

Under § 455(a), a judge is required to recuse himself “in any proceeding in which his impartiality might reasonably be questioned.”<sup>105</sup> Accordingly, “where a reasonable man knowing all the circumstances would harbor doubts concerning the judge’s impartiality,” disqualification is required.<sup>106</sup> Under § 455(b)(1), a judge is also required to recuse himself “[w]here he has a personal bias or prejudice concerning a party.” Under either subsection, the bias necessary to require recusal generally “must stem from a source outside of the official proceedings.”<sup>107</sup> Accordingly, “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.”<sup>108</sup> Likewise, “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.”<sup>109</sup> Such rulings or remarks may rarely support a bias challenge, but only if “they display a deep-seated favoritism or antagonism that would make fair judgment impossible.”<sup>110</sup> Claims of bias or partiality cannot be based on “expressions of impatience, dissatisfaction, annoyance, [or] even anger, that are

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<sup>105</sup> 28 U.S.C. § 455(a) (2000). Federal Rule of Bankruptcy Procedure 5004 confirms that § 455 also governs the disqualification of bankruptcy judges.

<sup>106</sup> See, e.g., United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983).

<sup>107</sup> Liteky v. United States, 510 U.S. 540, 554 (1994).

<sup>108</sup> Id. at 555.

<sup>109</sup> Id.; see also United States v. Bertoli, 40 F.3d 1384, 1412 (3d Cir. 1994).

<sup>110</sup> Liteky, 510 U.S. at 555.

within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.”<sup>111</sup>

*b. Discussion*

Considering this standard, Appellants' claims of bias cannot succeed. Beginning with their claims of bias in the pre-hearing filings, Appellants have based their attacks on the substance of the Bankruptcy Judge's judicial rulings and on comments he made during the proceedings.

For instance, Appellants attempt to argue that the Bankruptcy Judge displayed blatant bias against the Koresko Law Firm by implying that small firms should not be handling Chapter 11 cases. Yet, the transcript reveals that the Bankruptcy Judge merely made an obvious observation that Chapter 11 cases were difficult for small firms to handle because of the amount of time and work required for the filing.<sup>112</sup> This statement does not display any prejudice or bias against small firms; rather, it notes a truism about bankruptcy practice. In no way does the statement suggest that the Bankruptcy Judge is biased against Appellants because they are represented by a small firm, and the Court will not consider this argument any further.

Appellants' argument that the Bankruptcy Judge demonstrated his bias against them by raising objections, interrupting Koresko, and asking questions of witnesses on the stand, is equally unfounded. The Bankruptcy Judge was certainly permitted to disallow evidence deemed irrelevant and ask questions of witnesses to clarify issues deemed important. While judges are granted such

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<sup>111</sup> *Id.* at 555–56.

<sup>112</sup> N.T. Hr'g 5/8/06, at 244 (after Bonney noted the myriad tasks that she and Koresko had to perform before, during, and immediately after the filing, the Bankruptcy Judge says: “And regretfully[,] and perhaps it's a pox on the system[,] that's why [it is] very, very, very difficult for a small firm to do a Chapter 11. It takes your time. It takes a lot of time to do everything that's required.”).

authority in all proceedings, this is especially true in cases where the judge himself will be making the findings of fact and conclusions of law, as opposed to a jury. In a non-jury trial, there is no risk of prejudicing the jurors by interrupting counsel, raising objections, or asking questions. Additionally, Appellants have failed to make any showing that this alleged bias stems from a source outside of the official proceedings. Furthermore, Appellants have not shown how this conduct displays “a deep-seated favoritism or antagonism that would make fair judgment impossible.”

Appellants also argue that the Bankruptcy Judge’s bias against Wilson manifested itself in his finding that Wilson was not a credible witness. This argument lacks merit. In conducting the hearing on the motions to dismiss, it was obviously within the Bankruptcy Judge’s province to determine issues of credibility. The mere fact that the Bankruptcy Judge found Wilson’s testimony lacking credibility cannot be the basis of a bias claim. Such a ruling falls within the category of judicial conduct precluded from supporting a claim of bias by decisions such as Liteky. Even if Appellants were able to prove that this finding demonstrated some bias, they have not and could not prove that this bias stemmed from an extrajudicial source, rather than as a result of the proceedings of May 8 and 9.

Appellants’ final argument on bias is that the Bankruptcy Judge evidenced his bias by voicing his intention to impose sanctions against the petitioning creditors who did not attend the hearings.<sup>113</sup> First, as the transcript clearly shows, Appellant has mischaracterized the Bankruptcy Judge’s statements. The Bankruptcy Judge did not state that he would be imposing sanctions; he merely informed Koresko that if sanctions were to be imposed, the petitioning creditors would be

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<sup>113</sup> Appellants’ Br. [Doc. # 5], at 25.

subject to those sanctions.<sup>114</sup> More importantly, Appellants have again failed to offer proof that any alleged bias was derived from an extrajudicial source. They have also failed to convince the Court that this seemingly objective remark during the proceeding displays a deep-seated favoritism or antagonism that would preclude the Bankruptcy Judge from rendering a fair judgment.

In sum, there is no evidence in the record that the Bankruptcy Judge was required to recuse himself under § 455. Appellants' claims of bias have no merit, and this Court will not reverse any of the Bankruptcy Judge's orders as a result of the alleged bias, prejudice, or judicial intemperance.

#### **D. Application to Employ Attorneys**

In addition to the appeals directly related to the dismissal of the bankruptcy petitions, Appellants Wilson, Stinson Reliant, Koresko, and the Koresko Law Firm<sup>115</sup> appeal the Bankruptcy Court's May 16 Order and May 31 Supplemental Order denying the application to appoint the Koresko Law Firm as counsel for the debtor-in-possession in the voluntary case. Appellants claim that the application had been withdrawn before it was denied and, therefore, the Bankruptcy Court lacked the authority to act on it when it issued the orders. Appellants further argue that the orders must be reversed because they improperly attempt to bar Koresko from representing TRA LP in any matter in any court—which Appellants claim amounts to a permanent injunction—and they inappropriately characterize Koresko's conduct as unethical.

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<sup>114</sup> N.T. Hr'g 5/8/06, at 309, 310.

<sup>115</sup> The Court questions the standing of the Koresko Law Firm or John Koresko to file their own appeal of the May 16 and May 31 Orders. Their interest in this matter is contingent on the interests of the parties that they represent. The appeals brought by Koresko and the Koresko Law Firm are duplicative, in any event, since the actual applicant, Wilson, has also appealed the orders. Since Wilson clearly has standing, it is unnecessary for the Court to further discuss the question of Koresko's and the Koresko Law Firm's standing in order to resolve the issue herein.

## 1. Applicable Law

An issue or question is “moot” when it “presents or involves no actual controversy, interests, or rights, or where the issues involved have ceased to exist.”<sup>116</sup> In other words, a question is considered moot if the “issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.”<sup>117</sup> Specifically, after a dispute between a debtor and an adverse party ceases to exist, the controversy between the parties is moot, and any ruling on the issue is “an answer to a question not asked.”<sup>118</sup> Under constitutional principles, if an issue is moot, a court lacks the authority or jurisdiction to decide the issue.<sup>119</sup>

## 2. Discussion

While it is unclear whether the application was actually withdrawn, as Koresko claims, it is clear that the issue was moot after the Bankruptcy Court had granted the motions to dismiss and dismissed the voluntary petition. The application to employ counsel sought the Bankruptcy Court’s approval to employ an attorney or law firm to represent the alleged debtor, TRA LP, in the bankruptcy proceedings related to the voluntary petition. The primary purpose of the application is to permit the use of assets from the debtor’s estate to pay fees related to an attorney’s or law firm’s representation of the debtor in the bankruptcy proceedings. After the petition was dismissed on May 9, TRA LP was no longer a “debtor” and was no longer subject to the restrictions

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<sup>116</sup> 1A C.J.S. Actions § 76 (2007).

<sup>117</sup> Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 131 (3d Cir. 2002) (internal quotations omitted).

<sup>118</sup> New Jersey v. Heldor Indus., Inc., 989 F.2d 702, 707 (3d Cir. 1993) (holding that a bankruptcy court has no authority to render a decision on a moot issue).

<sup>119</sup> See, e.g., Rosetti v. Shalala, 12 F.3d 1216, 1223–24 (3d Cir. 1993).

of the Bankruptcy Code that require appointment of counsel. Additionally, as a result of the Bankruptcy Court's findings on May 9, TRA LP's assets would no longer be subject to the control of the trustee or anyone other than those with actual ownership in TRA LP. Accordingly, the issue was no longer "live" and there was no dispute for the Bankruptcy Court to resolve; no decision could have actually granted the relief sought in the application.

The Bankruptcy Court considered the possibility that the issue was moot, but determined that a ruling was necessary. Its reasons for acting on the application, however, are insufficient to overcome this Court's opinion that the issue was moot and the application should have been dismissed as such. Its first reason for ruling on the application was that the "debtor, TRA, LP, faces the possibility of defending against a request for sanctions by the dismissal motion movant."<sup>120</sup> While the parties that filed the voluntary bankruptcy petition, including Wilson and Koresko, would certainly be subject to a request for sanctions by Spano and TRA LP, the alleged debtor itself—which was injured by the unauthorized filing—could not be the subject of any sanctions.<sup>121</sup> Since the "real" TRA LP could not actually be subjected to sanctions, its assets certainly could not be commandeered to pay for the defense of a request for sanctions against Wilson and Koresko. Consequently, a "live" issue did not exist at the time that the Bankruptcy Court denied the application.

The Bankruptcy Court also stated that the issue was not moot because "TRA, LP,

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<sup>120</sup> Order Den. Mot. to Employ as Counsel [Ex. # 47], May 16, 2006, at 5, ¶ 16.

<sup>121</sup> As this last statement illustrates, discussion of this point is confusing. The voluntary petition was filed under the supposed authority of TRA LP, but the subsequent proceedings and the Bankruptcy Court's findings established that no such authority existed. In a sense, then, a "TRA LP" was on both sides of the dispute. The "real" TRA LP, however, was represented by Spano, not Wilson, so the "real" TRA LP could not be subject to sanctions for filing the petition.

could decide to appeal from our May 9, 2006, Bench Order and decision,” which would require the efforts of counsel.<sup>122</sup> This statement, however, confuses the parties that would actually be appealing. The “real” TRA LP—the assets of which the application attempts to procure to pay for the attorneys to be appointed—would not file an appeal. The “real” TRA LP and its controlling owner, Spano, were satisfied with the Bankruptcy Court’s rulings and had no basis or reason to appeal. TRA LP, which was no longer a debtor under the Bankruptcy Code after May 9, had already retained its counsel, Christopher Underhill, and any decision on the application would not have altered that relationship. In fact, even if the Bankruptcy Court had wanted to, it could not have compelled TRA LP to accept Koresko as attorney for an appeal by granting the application. As such, the issue was moot.

Because the issues of who would represent the alleged debtor and whether the estate would pay for that representation were moot after the bankruptcy petitions were dismissed, the Bankruptcy Court should have dismissed the application as moot. While the Bankruptcy Court retained jurisdiction over the case after the dismissals to decide related and still “live” issues or questions, it did not have jurisdiction to decide an issue that was rendered moot by its previous rulings. Therefore, this Court will vacate the May 16 Order and May 31 Supplemental Order, and no further review of the orders or the claims raised by Appellants is warranted or necessary.

#### **E. Orders Extending Time to File a Motion for Sanctions in the Bankruptcy Court**

Appellants’ final set of appeals challenge the Bankruptcy Court’s Orders of May 19,

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<sup>122</sup> Order Den. Mot. to Employ as Counsel, at 5, ¶ 16.

2006,<sup>123</sup> and June 19, 2006,<sup>124</sup> which extended the deadline by which Appellee TRALP was required to file any motions for sanctions under 11 U.S.C. § 303(i) or Federal Rule of Bankruptcy 9011. Appellants argue that the Bankruptcy Court lacked jurisdiction to issue the orders. They also argue that, even if the Bankruptcy Court had the authority to extend the deadline, sanctions are not appropriate in this case. At this stage, this Court's only considerations are whether the Bankruptcy Court had the authority to extend the deadline and, consequently, whether the Bankruptcy Court has existing jurisdiction to consider a motion for sanctions at this time.<sup>125</sup>

### **1. Applicable Law**

11 U.S.C. § 303(i) provides for the imposition of sanctions when an involuntary bankruptcy petition is dismissed other than on consent of all petitioners and the debtor. Unlike many sanctions provisions, § 303(i) does not require counsel for the debtor to make a request for sanctions under the statute in a separate motion.<sup>126</sup> Even without an explicit request or separately filed motion, the bankruptcy court may impose sanctions under the provision.<sup>127</sup> In the absence of bad faith on the part of the petitioning creditors, the moving party can seek costs and/or reasonable attorneys' fees.<sup>128</sup> If the bankruptcy court finds that the petition was filed in bad faith, the moving party can seek any

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<sup>123</sup> Order Extending Deadline [No. 06-3299, Ex. # 74], May 19, 2006.

<sup>124</sup> Order Extending Deadline [No. 06-3319, Ex. # 3], June 19, 2006.

<sup>125</sup> To the extent that these orders may be considered interlocutory orders, as Appellee argues, the Court exercises its discretion under Federal Rule of Bankruptcy Procedure 8003(c) to grant Appellants leave to appeal the orders as interlocutory.

<sup>126</sup> Compare 11 U.S.C. § 303(i) (2000) (lacking a requirement that the debtor file a separate motion for sanctions), with Fed. R. Bankr. P. 9011(c)(1) (requiring that a motion be made separately from other motions and that the motion describe the specific conduct alleged to violate the rule).

<sup>127</sup> See 11 U.S.C. § 303(i).

<sup>128</sup> Id. §§ 303(i)(1)(A)–(B).

damages proximately caused by the bad-faith filing and/or punitive damages.<sup>129</sup>

By its language, the statute contemplates sanctions only *after* the validity of the petition has been determined and the petition has been dismissed. While the filing of a notice of appeal in a case generally divests the trial court of jurisdiction over the case pending disposition of the appeal,<sup>130</sup> the trial court retains jurisdiction over collateral issues even after its judgment becomes final and the underlying action is no longer pending.<sup>131</sup> Imposition of costs, attorney’s fees, and/or sanctions under § 303(i) requires inquiry into and determination of a collateral issue only; it does not require any further judgment on the merits of the action.<sup>132</sup> The court’s imposition of § 303(i) sanctions “require[s] an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has ‘prevailed.’”<sup>133</sup> Accordingly, a trial court retains jurisdiction to determine whether § 303(i) sanctions should be imposed even after final judgment is entered.<sup>134</sup>

Federal Rule of Bankruptcy Procedure 9011, which is virtually identical to Federal Rule of Civil Procedure 11, permits the imposition of sanctions against an attorney who violates its provisions by, for example, filing a petition, pleading, or motion for an improper purpose, such as

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<sup>129</sup> Id. §§ 303(i)(2)(A)–(B). Sanctions for bad-faith filing can include “any damages proximately caused by the filing of the petition . . . such . . . as loss of business during and after the pendency of the case.” Id. § 303(i) Revision Notes.

<sup>130</sup> Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988).

<sup>131</sup> See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990); Pensiero, 847 F.2d at 97.

<sup>132</sup> Cf. White v. N.H. Dep’t of Employment Security, 455 U.S. 445, 451–52 (1982); Pensiero, 847 F.2d at 98 (discussing West v. Keve, 721 F.2d 91 (3d Cir. 1983), and Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985)); In re Ross, 135 B.R. 230, 234 (Bankr. E.D. Pa. 1991).

<sup>133</sup> Cf. White, 455 U.S. at 451–52 (discussing a court’s ability to hear fee and cost requests filed well after final judgment has been entered because such requests raise collateral issues that are separable from the cause of action to be proved at trial).

<sup>134</sup> Cf. id.; Pensiero, 847 F.2d at 97–98.

to harass or to cause unnecessary delay or needless increase in the cost of litigation; making frivolous arguments for the extension of existing law; or making allegations or other factual contentions that lack evidentiary support.<sup>135</sup> A request for sanctions under Rule 9011 must be initiated by a motion made separately from other motions and describing the specific conduct alleged to violate the Rule.<sup>136</sup>

In Mary Ann Pensiero, Inc. v. Lingle, the Third Circuit Court of Appeals considered whether motions for sanctions must be filed before a trial court's judgment becomes final.<sup>137</sup> The decision addressed both motions for statutory costs and fees and those for Rule 11 sanctions. Consulting its prior decision in West v. Keve<sup>138</sup> and the United States Supreme Court's decision in White v. New Hampshire Department of Employment Security,<sup>139</sup> the Third Circuit noted the differences between motions for statutory costs and fees and motions for sanctions under Rule 11.

A motion for statutory costs and fees

routinely requests payment for relevant services performed during the whole course of the litigation. There is, thus, good reason to wait until the lawsuit has been concluded before calculating the proper fee amount. The computation of attorney's fees in this context is frequently a detailed and prolonged undertaking, requiring thorough review by the trial judge and a sometimes lengthy hearing. . . . By contrast, when awarded as Rule 11 sanctions, attorney's fees ordinarily will not include compensation for the entire case, but only for expenses generated by the Rule violation itself. Consequently, deciding on the appropriate sanction usually demands less review by the trial court and often does not require a hearing.<sup>140</sup>

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<sup>135</sup> Fed. R. Bankr. P. 9011(b)(1)–(3).

<sup>136</sup> Fed. R. Bankr. P. 9011(c)(1)(A).

<sup>137</sup> 847 F.2d 90 (3d Cir. 1988).

<sup>138</sup> 721 F.2d 91 (3d Cir. 1983).

<sup>139</sup> 455 U.S. 445 (1982).

<sup>140</sup> Pensiero, 847 F.2d at 98–99.

As a result of the important distinction between these types of motions, the Pensiero court did not explicitly require that motions for statutory costs and fees be made before final judgment is entered.<sup>141</sup> As for Rule 11 motions, however, the Third Circuit instituted a supervisory rule that generally requires those motions—and, by analogy, Rule 9011 motions in the bankruptcy context<sup>142</sup>—to be filed in the trial court “before the entry of final judgment.”<sup>143</sup> The rationale behind this rule is that requiring early filing of Rule 11 motions for sanctions will conserve judicial resources by eliminating piecemeal appeals and avoiding scenarios in which two separate appellate panels are forced to acquaint themselves with the pertinent facts and parties’ respective positions, as well as deter future Rule 11 violations.<sup>144</sup> As the Pensiero court explained, early disposition of Rule 11 motions ensures that any challenge to that disposition can be included with the appeal on the merits, which serves the interest of judicial economy.<sup>145</sup> At the same time, however, the Pensiero court noted that it may rarely be “necessary to wait for the district court or court of appeals to rule on the merits of an underlying question of law” before the parties, or even the trial court, can fully appreciate that a violation has occurred.<sup>146</sup>

This Court understands the supervisory rule announced in Pensiero—applied to the

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<sup>141</sup> See id. at 99–100. The Court notes that the Third Circuit has extended the supervisory rule to motions for sanctions under a district court’s inherent power. See Prosser v. Prosser, 186 F.3d 403, 406 (3d Cir. 1999). This extension does not, however, reach motions for costs, fees, and sanctions under statutory provisions such as § 303(i).

<sup>142</sup> In re Nicola, 65 Fed. Appx. 759, 762 (3d Cir. 2003) (not precedential).

<sup>143</sup> Pensiero, 847 F.2d at 100. In the bankruptcy context, an order dismissing a bankruptcy petition becomes final ten days after its entry. See In re Nicola, 65 Fed. Appx. at 761 (citing Fed. R. Bankr. P. 8002).

<sup>144</sup> Pensiero, 847 F.2d at 99.

<sup>145</sup> Id.

<sup>146</sup> Id.

bankruptcy context in In re Nicola<sup>147</sup>—to be a guide for litigants filing Rule 11 motions for sanctions, generally requiring them to do so as early as practicable, but *not* necessarily “establish[ing] a *per se* test for promptness” that requires dismissal for noncompliance under all circumstances.<sup>148</sup> While the rule provides the courts in the Third Circuit with the discretion to avoid consideration of Rule 11 motions filed after final judgment is entered in order to promote judicial economy, it also appears to leave the courts with some “discretion in deciding when it is ‘practicable’ to file a sanctions motion.”<sup>149</sup>

The amount of discretion is, however, unclear. The Third Circuit’s decision in Simmerman v. Corino both extended and complicated the Pensiero supervisory rule.<sup>150</sup> In that case, the court of appeals reversed the district court’s *sua sponte* imposition of Rule 11 sanctions three months after final judgment was entered. The breadth of this decision’s mandate is unclear: while it implies a strict requirement that trial courts decide whether Rule 11 sanctions should be imposed before final judgment is entered,<sup>151</sup> the reversal was actually premised on an abuse of the trial judge’s discretion under the circumstances.<sup>152</sup> The opinion specifically notes that “the court abused its

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<sup>147</sup> In the Third Circuit’s non-precedential opinion in In re Nicola, the court found that the rationale underlying the decision in Pensiero concerning Rule 11 motions applies equally to bankruptcy cases involving Rule 9011. 65 Fed. Appx. at 762. Consequently, it applied the supervisory rule to vacate an award of Rule 9011 sanctions based on a motion that was filed after the bankruptcy court had entered final judgment. Id. at 763.

<sup>148</sup> Comuso v. Nat’l R.R. Passenger Corp., No. 97-CV-7891, 2000 WL 502707, at \*2 n.2 (E.D. Pa. Apr. 26, 2000).

<sup>149</sup> Id.

<sup>150</sup> 27 F.3d 58 (3d Cir. 1994).

<sup>151</sup> Id. at 63 (“There is no inordinate burden in requiring the district court to raise and resolve any Rule 11 issues prior to or concurrent with its resolution of the merits of the case.”).

<sup>152</sup> Id. at 62–63; id. at 64 (“Their imposition three months later was an abuse of discretion.”).

discretion in imposing sanctions on its own initiative more than three months after it had disposed of the underlying case,”<sup>153</sup> rather than finding that the reversal was compelled by the trial court’s error of law in failing to comply with the supervisory rule.

In light of this ambiguity, this Court does not understand Simmerman to require trial-court judges to “raise and resolve Rule 11 issues” before final judgment is entered in every case, regardless of the facts or circumstances of the particular case *sub judice*. In fact, the concurring opinion explicitly noted that the Pensiero rule was *not* intended to “supervise” the timing of a trial court’s decision on the sanctions issue.<sup>154</sup> A contrary reading of Simmerman would extend the Pensiero rule far beyond its original purpose and would unreasonably handcuff trial-court judges facing unusual and unique cases. If the circumstances of a particular matter call for a deviation from the norm, the trial court must retain some discretion to consider the sanctions issues as it deems appropriate, as long as it remains cognizant of the rationale underlying Pensiero while exercising its discretion. Ignoring the prudential considerations that underlie the supervisory rule would almost always constitute an abuse of discretion.

## **2. Discussion**

### *a. Extension of Time to File § 303(i) Motion*

In light of this precedent, the Court is unwilling to accept Appellants’ blanket assertion that the Bankruptcy Court did not have jurisdiction to set or extend deadlines for Appellee to file a motion for sanctions under § 303(i) as a result of the Pensiero supervisory rule. Read together, White and Pensiero establish that a trial court retains jurisdiction to consider motions for

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<sup>153</sup> Id. at 62–63.

<sup>154</sup> Id. at 65 (Fullam, J., concurring).

statutory costs and fees—since these are collateral issues—even after final judgment is entered. In fact, the Pensiero court noted that because the process of deciding these motions is often so complex and time-consuming, it is sometimes more prudent to delay their consideration until the matter is finally adjudicated. This approach helps to avoid unnecessary expenditure of judicial resources where an award may be mooted by reversal on the merits.<sup>155</sup> The language of § 303(i) itself calls for post-judgment consideration, and there is no Third Circuit precedent that applies the supervisory rule to sanctions motions under § 303(i) or other statutory provisions, or requires a trial court to decide the issue of statutory costs and fees before final judgment is entered. Thus, the Court is not convinced that the Third Circuit’s supervisory rule applies to preclude post-judgment consideration of a motion under the statute, and the Bankruptcy Court had jurisdiction to decide a motion after its judgment became final.

Moreover, even if the supervisory rule does apply to motions for sanctions under § 303(i), Appellee complied with the rule by requesting sanctions under the statutory provision in its motion to dismiss.<sup>156</sup> Appellee explicitly requested an award of “costs, including a reasonable attorneys’ fee, and compensatory and punitive damages pursuant to Bankruptcy Code Section 303(i).”<sup>157</sup> Appellee is not required to bring its request by separate motion and, thus, its request was pending at the time the Bankruptcy Court issued its orders extending the deadline to file such a motion. Nonetheless, the Bankruptcy Court was either unaware that a request was pending or was expecting a more formal or detailed motion.

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<sup>155</sup> Id. at 98.

<sup>156</sup> See Mot. to Dismiss [No. 06-2639, Ex. 9], at 5, ¶ 23.

<sup>157</sup> Id.

Since the Bankruptcy Court had jurisdiction to impose § 303(i) sanctions after final judgment was entered, it had the authority to exercise its discretion by extending the deadline for the filing of a more detailed motion. In exercising its discretion in this case, as in any case, the Bankruptcy Court may not abuse its discretion. Consequently, the key issues are whether the Bankruptcy Court's orders extending the deadline constituted an abuse of its discretion and, if so, how does that error affect Appellee's ability to pursue sanctions under § 303(i) at this time.

Considering the circumstances of these cases below, the Bankruptcy Court's first extension, which would have postponed its consideration of § 303(i) sanctions until sometime in June or July, was not an abuse of its discretion. Throughout late May 2006, the Bankruptcy Court continued to devote significant resources to handling matters related to Appellants' petitions, such as the application for employment of attorneys, a motion to intervene filed by Stinson Reliant, and numerous motions to reconsider. Postponing consideration of the § 303(i) sanctions issue for a short time was, therefore, a reasonable approach to managing its resources and was not an abuse of its discretion.

The June 19 order, on the other hand, which generally continued the deadline until after the instant appeals were resolved, is viewed differently. Even though the supervisory rule does not apply to § 303(i) motions, the prudential considerations underlying that rule are equally applicable in the § 303(i) context. The Bankruptcy Court knew that Appellants had filed multiple appeals on the merits and should have decided the § 303(i) sanctions issue within a reasonable period of time so that this Court could consider an appeal of imposed sanctions, if any, simultaneously with the instant merits appeal. It is not reasonable for a trial court to postpone consideration of such a request for sanctions until after the appeal on the merits has concluded. That tactic virtually ensures

piecemeal appeals and unnecessarily drains judicial resources. While the Bankruptcy Court was not required to consider the request before final judgment was entered, it was required to address the § 303(i) sanctions issue within a reasonable period of time after the involuntary petition was dismissed. As such, extending the deadline indefinitely was an abuse of its discretion.

Nonetheless, the Bankruptcy Court has continued jurisdiction to consider a motion for sanctions under § 303(i). While it was inappropriate for the Bankruptcy Court to defer the § 303(i) sanctions issue until this time, Appellee was not at fault for this error and cannot be prejudiced by the Bankruptcy Court's extension. In fact, Appellee timely requested such sanctions in its motion to dismiss the involuntary petition. Consequently, even though this Court is aware that an additional appeal is likely after sanctions are imposed, Appellee may pursue its claim for sanctions under § 303(i) in the Bankruptcy Court. Appellee should do so promptly. Upon the filing of a § 303(i) motion, if any, the Bankruptcy Court shall decide if a remedy is appropriate under the statute as expeditiously as practicable.

*b. Extension of Time to File Rule 9011 Motion*

After entering its findings and conclusions on the record on May 9, the Bankruptcy Court initially established May 30 as the date by which TRA LP could file a motion for sanctions under Rule 9011. Thereafter, Appellee's counsel was required to respond to numerous additional filings by Appellants—such as motions to reconsider and Stinson Reliant's unsuccessful motion to intervene—and to appear in court on May 15 and May 19—to address the application for employment of attorneys and Stinson Reliant's motion to intervene. In consideration of the continuing proceedings and demands of Appellee's counsel, the Bankruptcy Court extended the deadline until June 20. On June 19, acting *sua sponte*, the Bankruptcy Court extended the deadline

indefinitely pending final determination of the instant appeal. In its order, the Bankruptcy Court noted that Appellee's counsel had continued to request a hearing for sanctions and damages. Nevertheless, the Bankruptcy Court extended the deadline and postponed its consideration of sanctions. In reliance on the Bankruptcy Court's extensions, Appellee did not file a motion for Rule 9011 sanctions below.

Considering the supervisory rule announced in Pensiero and extended in cases such as Simmerman, it is clear that the Bankruptcy Court did not have the authority to extend the deadline for filing indefinitely.<sup>158</sup> Even if trial courts have some discretion in ensuring compliance with the supervisory rule, extending the deadline until after the pending appeals were resolved was an abuse of that discretion. Since the rule is intended to promote judicial economy and maximize the effectiveness of sanctions under Rule 11 and Rule 9011, such motions must ordinarily be filed before final judgment is entered. Under special circumstances, it is possible that a trial court would be required to consider a motion filed after final judgment was entered. For example, if a Rule 9011 violation occurs after final judgment, a motion for sanctions based on that violation would have to be filed after final judgment had been entered, and such filing would be permitted.<sup>159</sup> Even then, however, the rationale underlying the Pensiero rule would require the trial judge to consider any sanctions issues as expeditiously as practicable. Regardless of the uniqueness of the circumstances, it would rarely be appropriate for a trial judge to defer consideration of Rule 9011 sanctions until after a merits appeal has been decided.

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<sup>158</sup> The rule is most likely applicable in the bankruptcy context considering the Third Circuit's decision in In re Nicola, 65 Fed. Appx. 759 (3d Cir. 2003). Even though that decision was not precedential, it demonstrates the Third Circuit's likely approach to Rule 9011 sanctions in this case.

<sup>159</sup> See In re Nicola, 65 Fed. Appx. at 762 (noting that Rule 11 motions must be filed before the entry of final judgment "where such motions arise out of conduct that occurred prior to the final judgment").

Consequently, this Court finds that the Bankruptcy Court’s indefinite extension of the deadline for Appellee to file a motion for sanctions under Rule 9011 was an abuse of its discretion. That extension was so contradictory to the principles underlying the Third Circuit’s supervisory rule that the Court does not find it to be reasonable, even under the somewhat unique circumstances of this case.

Again, however, the Court must determine how this ruling affects Appellee’s current ability to seek Rule 9011 sanctions in the Bankruptcy Court. In making this determination, the Court has sought guidance from a doctrine applied in the Third Circuit to protect parties who would otherwise have been prejudiced by a trial court’s abuse of discretion or mistake of law: the “unique circumstances” doctrine.

The “unique circumstances” doctrine generally allows an untimely appeal to be heard by the appellate court if the delay in filing was induced by affirmative actions of the trial court.<sup>160</sup> Under the Federal Rules of Civil Procedure, trial courts do not have the authority to extend the time to file a post-judgment motion under Rule 59(e).<sup>161</sup> When a trial court improperly attempts to extend the filing deadline, and the appellant relies upon that purported extension, the “unique circumstances” doctrine will apply to “save” the appeal.<sup>162</sup> Under the doctrine, the appellate court may hear the appeal in order to ensure fairness and prevent the prejudice that would otherwise result from the party’s reliance on the trial court’s mistake.<sup>163</sup>

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<sup>160</sup> See Schneider v. Fried, 320 F.3d 396, 402–03 (3d Cir. 2003).

<sup>161</sup> See Fed. R. Civ. P. 6(b); 5 Am. Jur. 2d Appellate Prac. § 309 (2007).

<sup>162</sup> See 5 Am. Jur. 2d Appellate Prac. § 309.

<sup>163</sup> Schneider, 320 F.3d at 403.

While a motion for sanctions under Rule 9011 does not explicitly constitute a Rule 59(e) motion, in light of the Pensiero rule requiring that it be filed before judgment becomes final, it is certainly analogous. Accordingly, when a trial judge improperly attempts to extend the deadline by which motions for Rule 9011 sanctions must be filed, and the party seeking sanctions relies upon that purported extension, the party should not be precluded from bringing its motion even though it would currently be considered untimely. To hold otherwise would frustrate the notion of fairness that our judicial system strives to guarantee.

In this case, it would be unfair to disallow the filing of a Rule 9011 motion by Appellee after its counsel relied upon the Bankruptcy Court's *sua sponte* extensions of the time in which it could file such a motion. Appellee's counsel could not have been expected to realize that the Bankruptcy Court was exceeding its authority by extending the deadline beyond that normally set by the Third Circuit's supervisory rule. As the Third Circuit explained in Schneider, "where the [Bankruptcy] Judge misunderstood his own authority to grant an extension to the ten day filing period . . . and conferred upon [Appellee] 'the right' to an extension, it would be a harsh result to require the [Appellee] to question the [Bankruptcy] Judge's power to do so. The unique circumstances doctrine was designed for situations such as this, to prevent the [Appellee's] reliance on the [trial] court's mistake from prejudicing the [Appellee]."<sup>164</sup>

Moreover, it would be unjust to allow Appellants to use the Bankruptcy Court's mistakes as a shield to protect themselves from potential sanctions under Rule 9011. When counsel has relied upon a trial judge's specific extension of the deadline for filing motions for sanctions, an attorney or party that has allegedly violated Rule 9011 should not be able to avoid answering for the

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<sup>164</sup> Id.

alleged violation simply because the “injured” party has not filed its motion in accordance with the Pensiero rule, as Appellants suggest. The rule was not enacted to shelter counsel or parties who engage in misconduct—misconduct that reflects poorly on attorneys and litigants, in general—from the possibility of facing repercussions for their indiscretions. This is especially true in this case, where Appellee cannot be faulted for the untimely filing.

The Court notes that this particular issue—whether Appellee should be able to file its Rule 9011 motion in light of the Bankruptcy Court’s unauthorized extension beyond the deadline set by the Pensiero supervisory rule—is a matter of first impression. The Court feels that the rationale underlying the Third Circuit’s “unique circumstances” doctrine support its conclusion that Appellee should not be prejudiced by the Bankruptcy Court’s error. The interests of fairness would not be served by precluding the motion, and an adaptive application of Third Circuit precedent to these facts reassures the Court that Appellee should regain its right to file a Rule 9011 motion without judicial interference. Accordingly, this Court will reverse the Bankruptcy Court’s order indefinitely extending the deadline to file a motion for sanctions and will permit a post-appeal Rule 9011 motion for sanctions. The Court makes this ruling based on an understanding of its obligation to achieve a just result when the result is not otherwise obvious under existing precedent. Appellee should file any motion for sanctions under Rule 9011 without delay, and the Bankruptcy Court shall decide any such motion as expeditiously as possible.

#### **F. Motions for Sanctions Related to the Proceedings in This Court**

The only remaining matters in this case are the motions for sanctions filed by Appellee TRA LP<sup>165</sup> and East Hempfield Township seeking sanctions against all Appellants under

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<sup>165</sup> Appellee’s Mot. for Sanctions & Mem. of Law [Doc. ## 19 & 20], Sept. 25, 2006.

Federal Rule of Bankruptcy Procedure 8020, 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 11. The Court will dispose of the Township's motion by separate Order, since it presents issues discrete from those discussed in this Memorandum Opinion.

As for Appellee's motion, after reviewing the motion and weighing all of the relevant considerations, the Court finds that sanctions are appropriate in this case based on a litany of offenses, violations, and other misbehavior. From the time that the fourteen appeals in this case were filed, Appellants have demonstrated a disregard for the time, energy, and resources of this Court, an indifference toward the applicable and controlling legal authorities, and a general neglect toward their responsibilities as litigants and attorneys.

Koresko himself has undertaken litigation tactics that are unbecoming of an officer of the Court, such as attempting to conduct discovery well after the records in these appeals were complete<sup>166</sup> and filing motions that were wholly without merit.<sup>167</sup> In his briefs supporting these appeals, Koresko frequently mischaracterized the record<sup>168</sup> and often failed to include any legal support for his unconventional arguments.<sup>169</sup> When legal authority was cited, it was often misstated

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<sup>166</sup> Koresko attempted to subpoena myriad records of East Hempfield Township, requiring TRA LP and East Hempfield Township to file a motion to quash the subpoena. *See* Ex. A to Appellee's Mot. to Quash [Doc. # 14], Subpoena Served on East Hempfield Township, Custodian of Records (Aug. 24, 2006).

<sup>167</sup> *See* Mot. to Enjoin Violation of Stay [Doc. # 25], Nov. 1, 2006; Mot. for Reconsideration [Doc. # 34], Nov. 16, 2006.

<sup>168</sup> *See, e.g., id.* Appellants' Br. [Doc. # 5], at 15 (claiming that the Bankruptcy Court did not hold a hearing on the motion to rescind or extend the expedited schedule); *id.* at 18 (claiming that the Bankruptcy Court treated both motions to dismiss as motions for summary judgment); *id.* at 25 (claiming that the Bankruptcy Judge stated an intention to impose sanctions when, in fact, he merely raised the possibility of sanctions).

<sup>169</sup> *See, e.g., id.* at 20–27 (failing to cite to a single legal authority while arguing that the Bankruptcy Judge was biased and should have recused himself); Appellants' Br. [No. 06-2638, Doc. # 6], at 8–10 (failing to cite to any legal authority concerning the effective withdrawal of a motion or application, while assuming that the application was effectively withdrawn).

and then grossly misapplied to the facts in this case.<sup>170</sup> In addition, Koresko's personal attacks on the Bankruptcy Judge's character are inappropriate and wholly unwarranted.<sup>171</sup> Even in Appellants' response to the instant motion for sanctions, Koresko continued to ignore his duties as an officer of the Court, engaging in much of the same unacceptable conduct as he had in his earlier briefs.<sup>172</sup>

The Court is, however, most disturbed by Appellants' pursuit of these appeals with an ulterior motive beyond any legitimate intention to place TRA LP into bankruptcy protection. Appellants, including Koresko, have attempted to use the Court to prolong the inevitable and to delay TRA LP's plan to convert the warehouse into condominiums without Wilson as a partner in the project. Both the parties and their attorney have conducted themselves in a manner that this Court finds deserving of reproach. It is axiomatic that an attorney must "demean [himself] as an attorney of this Court uprightly"<sup>173</sup> and shall not "delay the cause of any person for lucre or malice."<sup>174</sup> That axiom should also apply to parties, who must pursue any cause with only legitimate intentions and conduct their affairs in this Court in a responsible manner.

The Court cannot and will not condone Appellants' conduct in this matter. This is

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<sup>170</sup> See, e.g., Appellants' Br. [Doc. # 5], at 18–20 (misstating the appropriate standards and arguing that the misstated law supported Appellants' position); *id.* at 31–35 (arguing for reversal of the July 2005 transaction based on an incomplete statement of the law of mutual mistake and misapplying the law to the sales agreement); *id.* at 36–38 (arguing that Wilson and Spano were co-venturers because there was no note indicating a creditor-debtor relationship and relying on a case that is wholly inapposite).

<sup>171</sup> See, e.g., *id.* at 22.

<sup>172</sup> See, e.g., Appellants' Br. in Response to Appellee's Motion for Sanctions [Doc. # 23], at 2 (continuing to claim that the Bankruptcy Court did not hold a hearing on the motion to rescind or extend the expedited schedule); *id.* at 3 (misstating the appropriate standards and arguing that the misstated law supported Appellants' position).

<sup>173</sup> Loc. R. of Civ. P. 83.5(c) (establishing the oath of office recited by an attorney admitted to practice law in the Eastern District of Pennsylvania).

<sup>174</sup> 42 Pa. Cons. Stat. Ann. § 2522 (West 2004) (establishing the oath of office recited by an attorney admitted to practice law in the state of Pennsylvania).

especially true of Koresko's conduct; as an attorney, he must be held to the oaths he took to discharge his duties with fidelity to the Court as well as to his clients. Accordingly, the Court will grant the motion.<sup>175</sup> The Court will fashion the details of these sanctions—including identifying the specific parties to be sanctioned and the amount of sanctions to be imposed—after holding a hearing on the matter.

### III. CONCLUSION

The Court has given this matter extensive consideration and exerted an extraordinary amount of judicial energy parsing through the numerous issues and determining the validity, or invalidity, of Appellants' claims. The Court has been forced to navigate through the claims on appeal with little guidance from Appellants in the way of supportive legal authority or comprehensible argument. Nonetheless, in the end, it is clear that Wilson had no authority to file the voluntary bankruptcy petition on behalf of an entity in which he had no ownership interest. It is equally clear that the claims of the petitioning creditors in support of the involuntary bankruptcy petition were disputed as to liability and amount. Accordingly, the Bankruptcy Court did not err by dismissing the petitions; it employed an appropriate expedited schedule, applied the appropriate standards procedure, and law, and properly granted the motions to dismiss. The Bankruptcy Court did err, however, by considering and ruling on Appellants' application to employ the Koresko Law

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<sup>175</sup> The Court is unsure whether the decision in Simmerman requires that timely filed motions for Rule 11 sanctions *always* be fully resolved "prior to or concurrent with its resolution of the merits of the case." 27 F.3d at 63. While the strictest interpretation of Simmerman may require full resolution of Rule 11-sanctions issues before final judgment, *see, e.g., Langer v. Presbyterian Med. Ctr. of Philadelphia*, Civ. Nos. 87-4000, 88-1064, 91-1814, 1995 WL 395937, at \*4 (E.D. Pa. July 3, 1995), the Court believes that its current disposition of Appellee's motion for sanctions complies with the Pensiero supervisory rule. Under DiPaolo v. Moran, 407 F.3d 140, 145 n.3 (3d Cir. 2005), the supervisory rule is not implicated when the sanctions motion is filed and the decision to impose sanctions is rendered before final judgment is entered. The actual sanctions award may be fashioned *after* final judgment is entered. *See id.*

Firm as attorneys, and the Court will vacate that ruling. The Bankruptcy Court also erred by indefinitely extending the deadline for Appellee to file any motions for sanctions, but in the interests of fairness, Appellee will not be precluded from filing a motion for sanctions at this time.

Appropriate Orders follow.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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*In re:*

**TOBACCO ROAD ASSOCIATES, LP**

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: **CIVIL NO. 06-CV-2637**  
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**ORDER**

**AND NOW**, this 30<sup>th</sup> day of March 2007, upon consideration of the records in the appeals originally docketed at 06-2637, 06-2638, 06-2639, 06-2640, 06-2641, 06-2642, 06-2643, 06-3299, 06-3301, 06-3318, 06-3319, 06-3320, 06-3321, and 06-3322, and consolidated under 06-2637, Appellants' briefs in this matter [No. 06-2637, Doc. #5; No. 06-2638, Doc. # 6; No. 06-3299, Doc. # 3], Appellee's briefs in this matter [No. 06-2637, Doc. # 12; No. 06-2638, Doc. # 12; No. 06-3299, Doc. # 4], and the applicable legal authorities, the Court hereby **ORDERS** and **ADJUDGES** the following:

- (1) The Bankruptcy Court's Order dated May 9, 2006, dismissing the involuntary bankruptcy petition is **AFFIRMED**;
- (2) The Bankruptcy Court's Order dated May 9, 2006, dismissing the voluntary bankruptcy petition is **AFFIRMED**;
- (3) The Bankruptcy Court's Order dated May 9, 2006, denying the motion to rescind or extend the expedited hearing is **AFFIRMED**;
- (4) The Bankruptcy Court's Orders dated May 16, 2006, and May 31, 2006, denying the debtor-in-possession's application for authority to employ attorneys are **VACATED**;
- (5) The Bankruptcy Court's Order dated May 19, 2006, is **AFFIRMED IN**

**PART** and **REVERSED IN PART**. It is **AFFIRMED** inasmuch as it extended the deadline for a more detailed motion under 11 U.S.C. § 303(i). It is **REVERSED** inasmuch as it extended the deadline for the filing of a motion under Federal Rule of Bankruptcy Procedure 9011.

- (6) The Bankruptcy Court's Order dated June 19, 2006, generally continuing the deadline by which Appellee was required to file motions for sanctions in the Bankruptcy Court is **REVERSED**.

It is **FURTHER ORDERED** that Appellee **MAY FILE** a motion for sanctions under 11 U.S.C. § 303(i) and Federal Rule of Bankruptcy 9011 in the Bankruptcy Court within fourteen (14) days of the date of this Order.

It is **FURTHER ORDERED** that the Clerk of Court shall **CLOSE** this case for statistical purposes. The Court retains jurisdiction to fashion the sanctions award.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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*In re:*

**TOBACCO ROAD ASSOCIATES, LP**

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**CIVIL NO. 06-CV-2637**

**ORDER**

**AND NOW**, this 30<sup>th</sup> day of March 2007, upon consideration of Appellee's Motion for Sanctions and Memorandum of Law [Doc. ## 19 & 20], and Appellants' Response thereto [Doc. # 23], it is hereby **ORDERED** that the Motion is **GRANTED**.

It is **FURTHER ORDERED** that Appellee is **DIRECTED TO FILE** a supplemental statement of costs and fees, including all expenses incurred in defending against the consolidated appeals. Appellee shall file this supplemental statement on or before **April 6, 2007**. Appellants John J. Koresko, V, Esquire, the Koresko Law Firm, Gary Wilson, Stinson Reliant, Kit Gee, and Richard Wilson may respond to the supplemental statement on or before **April 11, 2007**, at **4:00 p.m.**

It is **FURTHER ORDERED** that a hearing on the imposition of sanctions is **SCHEDULED** in this matter for **Friday, April 13, 2007**, at **9:30 a.m.** At said hearing, **ALL PARTIES AND COUNSEL MUST BE PRESENT**.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**