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

In Re:	:	CIVIL ACTION
HISTORICAL LOCUST STREET	:	
DEVELOPMENT ASSOCIATES	:	
	:	NO. 04-CV-4889

MEMORANDUM AND ORDER

JOYNER, J. **December 20, 2005**

This is an appeal from the Orders issued on January 23, 2004 and September 17, 2004 by Judge Kevin J. Carey of the United States Bankruptcy Court for the Eastern District of Pennsylvania granting the Motion of the debtor, Historical Locust Street Development Associates, L.P. and D.J.W. Trust to Compel the City of Philadelphia to return the $34,173.42 in attorney's fees that it had received pursuant to the distribution under Debtor's Chapter 11 Joint Plan of Reorganization and denying reconsideration of that directive. For the reasons which follow, we affirm the prior orders of the Bankruptcy Court.

Factual Background

The Debtor's Chapter 11 bankruptcy in this case was initiated when three of its unsecured creditors filed an involuntary petition on June 10, 1999. Beginning on September 9, 1999, Debtor operated as a debtor-in-possession over its assets which included real estate at 238-244 South 8th Street in Philadelphia. The City of Philadelphia had a municipal lien

against those premises for unpaid real estate, water/sewer assessments and business privilege taxes for which it had timely filed a proof of claim in the total amount of $621,719.76 on or about September 7, 1999. In subsections 5 and 6 of the Proof of Claim, the City claimed that of that total amount, $616,394.02 was secured and $4,118.02 was an unsecured priority claim. The City also attached what appears to be an additional nine pages from its Real Estate Tax System's Account Balance Summary to the Proof of Claim reflecting unpaid taxes and assessments dating back to as early as July, 1987 together with accrued interest and penalties. The first page of the attachment is entitled "Itemization Pursuant to Local Rule 3001.1" and is comprised of four columns for "principal," "interest," "cost" and "total." Although there are categories for other entries, the City entered monetary amounts only for real estate, water/sewer and business tax. On several of the following account balance summary pages, the following language appears: "*6 PERC LEGAL FEE ADDED TO YEARLY TOTAL FOR YEARS GREATER THAN 1989 AND NOT 1999*". As Judge Carey noted at pages 2-3 of his January 23, 2004 Memorandum,

> "[o]n the attachment pages containing the computer screen print-outs, the amount shown in the "Outstanding Balance" column does not equal the sum of the four prior columns (Principal, Interest, Penalty and Other). Instead the Outstanding Balance reflects that sum *plus* six percent. It also appears that the amount included in the "Cost" column on the Itemization Page reflected the sum of the following pages' "Other" columns, *plus* the total of the attorney fees. Therefore while the six percent attorney fees were not separately itemized or labeled, they were mathematically

accounted for in the attachments and on the Itemization Page."

The Debtor and D.J.W. Trust[1] filed several plans and disclosure statements before finally obtaining confirmation of the Fourth Amended Joint Plan of Reorganization on March 27, 2002. (Record Designation Nos. 19, 21). Although it did not object to this plan, previously the City had objected to the Debtor's proposed plans and disclosure statements because, *inter alia*, they did not provide the full amount of the claim of the City for real estate taxes. (Record Designation Nos. 18 and 20). Under ¶2.3 of the confirmed plan, Class 2 Claims were defined as consisting of all secured claims of the City and were deemed to be unimpaired such that the City was to be paid in cash the portion of its allowed claim attributable to principal, interest and other non-penalty charges as soon as practicable after the later of the effective date of the plan (as defined in ¶1.24) or

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[1] According to the Second and Fifth Amended Disclosure Statements,

"Debtor is a Pennsylvania limited partnership which was formed in 1985 and is engaged in the business of owning and operating a 17-unit residential apartment building located at 238-244 South 8th Street, Philadelphia, PA 19107..." "...DJW Trust is a trust formed for the benefit of Donna Jean Welch...," (the wife of Robert G. Welch, the sole general partner of Debtor) "...Welch and their children. The trustee of DJW Trust is Donna Jean Welch. DJW Trust purchased its mortgage against the premises from Nomura Asset Capital Corporation, which had acquired it from Resolution Trust Corporation in connection with the liquidation of Nassau Savings and Loan Association, the original mortgagee. There is no relationship between DJW Trust, Welch, Debtor or any limited partners of the Debtor and Nomura Asset Capital Corporation..."

(Second Amended Disclosure Statement, Record Designation No. 17, at pp. 3-5; Fifth Amended Disclosure Statement, Record Designation No. 20 at pp. 5-7).

the closing date of the sale or refinance of the premises. (¶4.3 of Fourth Amended Joint Plan of Reorganization, Record Designation No.19). As noted in Section IV(A)(2) of the Fifth Amended Disclosure Statement, "[t]he City of Philadelphia has asserted secured tax claims in an aggregate amount of $639,129.15. Of this aggregate, the City attributes $405,964 to principal, $205,012.30 to interest, and $28,152.85 to penalties."

Settlement on the sale of the premises was scheduled to take place on June 26, 2002. Shortly before the settlement date, counsel for D.J.W. Trust[2] contacted the City to obtain a final payoff figure. Via letter dated June 21, 2002, the City cited a payoff figure of $731,999.71, which figure "includes all Real estate tax attorneys' fees authorized by 53 P.S. §7106(a) and implemented by the Philadelphia Code at §19-3100." (Record Designation 22). The City apparently explained that the higher payoff figure was attributable to the accrual of an additional $67,150.27 in interest and $6,414.26 in sewer and water rents together with $1,272 in liens and fees associated with actual recording costs and $34,173.42 in attorney fees.[3] Debtor

[2] It appears from the Settlement Statement attached at Record Designation 24 that the purchaser of the premises at 238-244 S. 8th Street was Donna Jean Welch.

[3] As noted by Judge Carey, the June 21, 2002 letter did not include a breakdown of the final payoff figure and the record before this Court as well does not permit an independent determination of the total amount of attorney fees claimed by the City as part of its lien. Given that the parties appear to be in agreement with the recitation of the facts and breakdown set forth in the Debtor's Motion to Compel, however, we too shall treat the Debtor's figure of $34,173.42 as the amount of attorney's fees claimed by the City as the

objected to what it believed to be the City's eleventh hour claim for counsel fees and proposed placing the disputed amount into escrow until such time as the matter could be resolved. The City refused and the debtor proceeded to closing on the sale of the property. At the settlement, the City received payment of the full amount which it had claimed-–$731,999.71.

Thereafter, on August 30, 2002, the debtor and D.J.W. Trust filed a Motion in the Bankruptcy Court to Compel the City to Turn over Excess Distribution, *i.e.*, the $34,173.42 in attorney's fees. (Record Designation No. 25). A hearing on the motion was held before Judge Carey on November 20, 2002, at which Robert Welch was the sole witness. On January 23, 2004, Judge Carey issued his decision granting the Debtor's Motion to Compel via written Memorandum and Order and holding: (1) that the City had not proven that it would be prejudiced by Court consideration of the Debtor's motion as a contested matter rather than as an adversary proceeding; (2) that the debtor's post-confirmation objections were not too late, and (3) that since 11 U.S.C. §506(b) applies only to postpetition attorney fees and the City had no other authority to impose attorney fees on account of delinquent real estate taxes and failed to provide any evidence of the reasonableness of the attorney fees imposed on account of the outstanding municipal (*i.e.*, water and sewer) claims, the

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amount in dispute.

City should return the $34,173.42 in attorney fees which it received following sale of the property to the debtor.[4]

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[4] Specifically, the Bankruptcy Court found that, under "United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), Bankruptcy Code §506(b) prevents the City from recovering postpetition attorney fees on its oversecured claim." (Record Designation No. 2, at p. 10). Indeed, Section 506(b) states that,

> "[t]o the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

"The City, accordingly," Judge Carey held, "has limited its claim to prepetition attorney fees." Judge Carey then went on to determine the issue of the City's entitlement to prepetition counsel fees under 11 U.S.C. §502(b), which provided in relevant part,

> ...if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

11 U.S.C. §502(b)(1).

As the City contended that its attorney fees were permitted by applicable law, specifically §19-3101 of the Philadelphia Code, Judge Carey looked to that section, which stated, in relevant part:

> (1) Subject to revision from time to time pursuant to subsection 19-3101(2), the following schedule of attorney fees shall apply to the City's imposition of attorney fees under Section 3(a) of the Municipal Claims and Tax Lien Act (53 P.S. §7106(a), as amended, in connection with the collection of delinquent tax and other municipal claims:
>
> > (a) In a matter handled by Law Department attorneys, attorney fees of six percent (6%) of the amount of the delinquent claim shall be imposed.

In light of the Philadelphia Code's reference to 53 P.S. §7106(a), Judge Carey took note of the then-recent decision by the Pennsylvania Supreme Court in Pentlong Corp. v. GLS Capital, Inc., 573 Pa. 34, 820 A.2d 1240 (2003) that §7106(a) applied only to municipal claims and not general tax claims such as property taxes and that that Section did not give the city authority to impose attorney fees for the collection of real estate taxes. (Record Designation No. 2 at p. 13). He further noted that Section 7106(a.1) allowed a property owner to challenge the reasonableness of claimed attorney fees. Since most of the City's claim against the Debtor was for real estate taxes and since the City had failed to offer any evidence to support the reasonableness of its

The City filed a motion for reconsideration of that Order on February 6, 2004 and another hearing on that motion was held on September 13, 2004. At that time, the City orally moved to re-open the record to submit evidence of the reasonableness of its claimed counsel fees on the grounds that it had been unjustly surprised by what it alleged to be the Court's raising of the reasonableness issue under 53 P.S. §7106 *sua sponte*. The Bankruptcy Court rejected both the City's oral motion to re-open and its written motion for reconsideration essentially on the grounds that the City should not have been surprised by the Court's consideration of the reasonableness of the fees claimed given that the Debtor had raised the issue of the reasonableness of the fees under a related statute. (Record Designation No. 15, at pp. 14-16). The City now appeals.

Standard of Review

Under 28 U.S.C. §158(a),

> The district courts of the United States shall have jurisdiction to hear appeals
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> > (1) from final judgments, orders, and decrees;
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> > (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

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claimed counsel fees, Judge Carey concluded that such fees could not be allowed and ordered that the $34,173.42 in fees be returned to the Debtor. Although §7106(a) has since been amended to apply also to general tax claims, neither of the parties here have raised this issue and we therefore do not address it either.

> (3) with leave of court, from other interlocutory orders and decrees;
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> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

Under Fed.R.Bankr.P. 8013,

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, 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.

In considering such bankruptcy appeals, the district courts are thus required to review the bankruptcy court's findings of fact for clear error and apply plenary review to its conclusions of law. IRS v. Pransky, 318 F.3d 536, 542 (3d Cir. 2003); In Re Krystal Cadillac Oldsmobile GMC Truck, Inc., 142 F.3d 631, 635 (3d Cir. 1998). Thus, under 28 U.S.C. §158(a), the district court sits as an appellate court and is not authorized to engage in independent fact finding. Nantucket Investors II v. California Federal Bank, 61 F.3d 197, 210 (3d Cir. 1995).

Discussion

By this appeal, the City asserts that the Court denied it procedural due process in applying 53 P.S. §7106 without allegedly notifying it that it would be doing so and improperly shifted the burden of proof to it from the Debtor in

contravention of Raleigh v. Illinois Department of Revenue, 530 U.S. 15, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000). Additionally, the City contends that by *sua sponte* deciding the case on the basis of 53 P.S. §7106(a.1), the Court ignored the provision in the statute which permits municipalities to determine attorney fees by local ordinance and thereby further prevented the City from requesting that the Bankruptcy Court abstain from resolving the issues in favor of submitting them instead to the Pennsylvania state courts. We address these arguments *seriatim*.

First, citing Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), the City argues that the Court violated its right under the Fifth Amendment to notice and the opportunity to be heard. We disagree.

It is true that "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). "The root requirement of the Due Process Clause" is that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Id. Accordingly, we must focus on whether the "procedures available provided [the City] with due process of law," being mindful that the Constitution does not require perfection at every stage of a process. Lape v.

Pennsylvania, No. 05-1094, 2005 U.S. App. LEXIS 25167 at *21-*22 (3d Cir. Nov. 22, 2005); Alvin v. Suzuki, 227 F.3d 107, 119 (3d Cir. 2001).

In this case, we find it clear that the City had ample notice that the reasonableness of its claimed attorney fees was at issue and that it was given the opportunity to be heard on the matter. For one, we note that it was the City itself which first raised 53 P.S. §7106(a) and Philadelphia Code §19-3100 in its letter of June 21, 2002 to the Debtor's counsel when it demanded the payment of the attorneys' fees from the proceeds of the sale of the Debtor's property. (Record Designation No. 22). Second, the Debtor clearly challenged the methodology by which the City claimed its counsel fees in its written motion to compel. Indeed, paragraphs 13 and 14 of the motion read as follows:

> 13. Even assuming, arguendo, that a portion of the requested attorneys' fees relates to pre-petition efforts, the City is not entitled to the attorneys' fees as currently calculated. The Philadelphia Municipal Code §19-3101 authorizes the imposition of attorneys' fees in the amount of six percent of the amount of the delinquent claim. Debtor submits that, while this provision may apply outside of the bankruptcy context, it is inapplicable in bankruptcy. See In re West Chestnut Realty of Haverford, Inc., 186 B.R. 612, 618 (Bankr. E.D.Pa. 1995)(disallowing attorneys' fees assessed as flat percentage and "not based in any way on actual time and costs incurred," and finding that, under Pennsylvania law, the total amount of the fee award must be reasonable in relation to the services actually provided). See also, In re Olick, 221 B.R. 146, 152-53 (Bankr. E.D.Pa. 1998) (in order to be allowed, attorneys fees must be a) allowable under 11 U.S.C. §506(b), b) provided for in the parties' agreement or by statute, c) reasonable, and d)

> allowable under state law). Not only must "a party requesting fees pursuant to §506(b)...document and justify all amounts sought," but also "[o]nly services described in presentations similar to fee applications as required under the standards of Local Bankruptcy Rule 2002.2(a)...may serve as the basis for a §506(b) claim." In re Nardi, 1992 Bankr. LEXIS 1992, *8 (Bankr. E.D.Pa. 1992)(limiting attorneys' fees requests to only those fees appropriately documented).
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> 14. The City simply applied the flat, six percent rate prescribed by Municipal Code §19-3101 to arrive at its attorneys' fee request. Under West Chestnut, Nardi, and other applicable case law, this technique is not permissible. To the extent the City is entitled to any attorneys fees at all, those fees must be reasonable in relationship to the work actually performed, and the City must submit an itemized list of the time spent and tasks performed to support the fee request.

(Record Designation No. 6). At the hearing held on the Debtor's motion on November 20, 2002, the Debtor's counsel specifically asked his witness if there was any breakdown of the amount of attorney fees and if the City had provided him with any bills indicating how the amount of counsel fees had been calculated. (Record Designation 8, pp. 16, 24-26). It further appears from the record of this hearing that the City had the opportunity to present evidence at that hearing but did not do so, choosing instead to present only oral argument. (Record Designation No. 8 at pp. 40-46).

Finally, at pages 4-5 of the Supplemental Memorandum of Law which the Debtor filed in Support of its Motion to Compel the City to Turn Over Excess Distribution on November 27, 2002, the Debtor argued that, under United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) and 11 U.S.C. §506(b) the holder of an

oversecured claim (which the City does not dispute that it is), is only entitled to recover fees, costs and charges if they are reasonable and provided for in the agreement under which the claim arose; in the absence of an agreement, postpetition interest is the only added recovery available. Because the attorneys' fees asserted by the City were neither reasonable nor provided for under an agreement, the Debtor argued, they were unrecoverable by the City. (Record Designation No. 9, pp. 4-5).

Moreover, in its Memorandum of Law in Response to the Debtor's Supplemental Memorandum of Law, we note that the City *did* address the issue of the reasonableness of its fees:

> The Debtor also disputes the amount claimed by the City for Legal fees. This amount is provided in The Philadelphia Code, the comprehensive codification of all general ordinances of the City, at §19-3101(a), which provides that "(I)n a manner handled by Law Department Attorneys, attorney fee of six percent (6%) of the amount of the delinquent claim shall be imposed." Thus, both the amount and the priority of the applicable Legal Fees are established by statute...

(Record Designation No. 11, at p.6). The City further responded:

> Even if this Court disagrees with the City's interpretation of Bankruptcy Code §506(b) and Ron Pair, this Court should decide the §506(b) issue prospectively, due to the equities of the instant action. The Debtor's action is grossly inequitable as it seeks, years after the fact, time records from the City regarding its Legal Fee claim...Yet despite the fact that the City filed its Proof of Claim in 1999, and despite the knowledge that the City was actively participating actively (sic) in the case for years, the Debtor only now demands that the City provide an accounting of its time spent in the case. This late demand severely prejudices the City in terms of providing any records of the time it spent in the case. As such, the Debtor's demand for the disallowance [of] fees should be rejected on equitable

grounds.

Record Designation No. 11, at p. 14). Thus, it appears to this Court that the City obviously had notice that the Debtor was arguing and the Bankruptcy Court would be considering whether or not the attorneys' fees to which it was claiming entitlement were reasonable. It further appears that the City consciously elected instead to present no evidence or time records to the Court on the grounds that to require it to do so was inequitable. Clearly then, the City had sufficient notice and an opportunity to be heard to satisfy the standards of due process.[5]

As to the City's second argument that the burden of proof was improperly shifted to it *sua sponte* in contravention of the Supreme Court's holding in Raleigh, we note that in that case, the Court held that the burden of proof on a tax claim in bankruptcy remains where the substantive tax law puts it. Raleigh, 489 U.S. at 26, 120 S.Ct. at 1958. However, the threshold issue in this appeal as we see it, does not concern who bears the burden of proof on the tax claim[6] but which party bears

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[5] See Also, Movants' Reply to Memorandum of Law of the City of Philadelphia in Response to Movants' Supplemental Memorandum in Support of Motion to Compel City to Turn Over Excess Distribution, Record Designation No. 12, pp. 9-10.

[6] Generally, the taxpayer bears the burden of producing evidence to rebut the presumption that the government's tax deficiency assessment is correct. See, Helvering v. Taylor, 293 U.S. 507, 515, 55 S.Ct. 287, 291, 79 L.Ed.2d 623 (1935); Resyn Corp. v. United States, 851 F.2d 660, 663 (3d Cir. 1988). However, once the taxpayer has sustained its burden of proving that the assessment is arbitrary and excessive or that it lacks a rational foundation in fact and is based upon unsupported assertions, the ultimate burden of proving that the assessment is indeed correct is placed on the

the burden of proving that the attorneys' fees sought are reasonable. Under Third Circuit law, the fee applicant has the burden of proving it has earned the fees it requests and that the fees are reasonable. Zolfo, Cooper & Co. v. Sunbean-Oster Co., Inc., 50 F.3d 253, 261 (3d Cir. 1995); In re: The Pain Clinic, Inc., No. 97-25315, 2000 Bankr. LEXIS 80 at *3 (Bankr. W.D.Pa. Feb. 3, 2000). See Also, In re Busy Beaver Building Centers, Inc., 19 F.3d 833 (3d Cir. 1994)(holding, *inter alia,* that under 11 U.S.C. §330(a), bankruptcy courts have duty to review fee applications notwithstanding the absence of objections). Accordingly, we find no error in Judge Carey's conclusions that the City's failure to present any evidence of the reasonableness of the attorney fees imposed was fatal to its claim.

The City next contends that by "deciding the case on the basis of 53 P.S. §7106(a.1) *sua sponte* and without affording the parties the opportunity to respond to the statute," the Bankruptcy Court "ignored the provision in the statute which allows municipalities to determine attorneys' fees by local ordinance" and "did not even consider the allowance of statutory fees as the presumptively reasonable amount. As such, the City respectfully requests that the Bankruptcy Court decision be reversed, or alternatively, remanded to allow Bankruptcy Court to

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government. Resyn, supra., citing Baird v. Commissioner, 438 F.2d 490, 492 (3d Cir. 1971).

consider the reasonableness of the statutory six percent fee rate, as provided for by 53 P.S. §7106(a.1). (Brief of Appellant in Support of Appeal of the Orders of Bankruptcy Court Dated January 23, 2004 and September 17, 2004 Pursuant to Fed.R.Bankr.P. 8010, at pp. 19-21).

As discussed above, we find that the Bankruptcy Court did not *sua sponte* decide this case on the basis of 53 P.S. §7106(a.1). It was the City itself which first raised this statute in its initial submissions and the City had ample opportunity to present evidence and argument that the statutory six percent legal fee which it was claiming was reasonable. We thus see no reason to overturn Judge Carey's decision on the basis of this argument.

The City's final argument is that by *sua sponte* deciding the case on the basis of 53 P.S. §7106(a.1) without affording the parties the opportunity to respond to the statute, the Bankruptcy Court denied the City its right under 28 U.S.C. §1334 to request that the issue be heard in a Pennsylvania state court instead of in the Bankruptcy Court and further denied the City its right to have the District Court review the abstention decision.[7] Again,

[7] Specifically, 28 U.S.C. §1334 provides the following in relevant part:

> (c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

we reject the City's argument that the Bankruptcy Court raised the state statute on its own accord. We reiterate that the City itself raised the very statute at issue in its initial letter to the Debtor demanding payment of its counsel fees and again in its briefing to the Bankruptcy Court on the Debtor's Motion to Compel. (See, e.g., Record Designation Nos. 11, pp. 5-6; 22). There was absolutely nothing to prevent the City from requesting abstention from the Bankruptcy Court and there is absolutely no foundation in the record before us to justify reversal or remand of this matter to the Bankruptcy Court.

For all of the reasons set forth above, we affirm the orders of the Bankruptcy Court. An order follows.

> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

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

In Re:	:	CIVIL ACTION
HISTORICAL LOCUST STREET	:	
DEVELOPMENT ASSOCIATES	:	
	:	NO. 04-CV-4889

ORDER

AND NOW, this 20th day of December, 2005, upon consideration of the Appeal of the City of Philadelphia from the Orders of the United States Bankruptcy Court for the Eastern District of Pennsylvania dated January 23, 2004 and September 17, 2004, it is hereby ORDERED that the aforesaid Orders are AFFIRMED and the Appeal DENIED for the reasons set forth in the preceding Memorandum Opinion.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.