No. 21- 1177

IN THE

Supreme Court of the United States

PHILIP JAY FETNER,
Petitioner,
v.
KEVIN R. McCARTHY, TRUSTEE
&
HOTEL STREET CAPITAL, LLC, CREDITOR,
Respondents.

On Petition for Writ of Certiorari
to The United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

February 22, 2022

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QUESTIONS PRESENTED

Petitioner asks this Court to review two inter-related questions:

(1) Was Debtor's (Petitioner's) fundamental right to due process violated by the Bankruptcy Court who admittedly early in this case developed and drove a bias for a predetermined result adverse to Debtor but refused to recuse itself as mandated by 28 U.S. Code §455(a)?

(2) Moreover, was Debtor's constitutional right to an appeal violated first by a District Court that itself was compromised and did not properly address compelling facts and objective arguments, when individually or taken as a whole reasonably demonstrated the Bankruptcy Court's prejudice or bias, and second by a Circuit Court of Appeals that effectively failed to address both the merits of the original motion to recuse or the argument for the District Court's own recusal?

In sum, this case concerns clear demonstrable bias in a bankruptcy court, followed by two sham appeals. The overriding issue is whether this Supreme Court will exercise its jurisdiction, both appellate and supervisory, to preserve the ethical compass of the bankruptcy process. The importance of this matter will be argued further by Petitioner in this brief.

PARTIES TO THE PROCEEDING IN THIS COURT AND RULE 29.6 STATEMENT

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Petitioner is PHILIP JAY FETNER,
Debtor-Appellant

Respondents are indicated above. Hotel Street Capital was the only creditor to participate in the appeal. Petitioner is not a corporation.

RELATED PROCEEDINGS

United States Bankruptcy Court
Eastern District of Virginia
Alexandria Division

In re:
Philip J. Fetner, Debtor

Kevin R. McCarty, Plaintiff
v.
Hotel Street Capital, LLC, et al., Defendants

Case No. 17-13036-KHK
Chapter 7

Adversary Proceeding
No. 19-1039-KHK

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JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion in Appeal No. 20-2209 on June 28, 2021. Petitioner's timely petition for panel and *en banc* rehearing was denied on October 5, 2021.

The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1257.

OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals, the District Court for the Eastern District of Virginia, and the Bankruptcy Court for the Eastern District of Virginia are reproduced in Appendices A-E. The opinions are unreported.

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III and the Fourteenth Amendment to the United States Constitution, Bankruptcy Code. 28 U.S.C. §455(a).

INTRODUCTION

This matter involves the evidence for and proof of bias in the Bankruptcy Court, on the one hand, and the treatment of Debtor's appeals to the District Court and the Circuit Court of Appeals relative to the allegation of bias, on the other hand.

The intellectual stigma of alleging bias of a federal judge is significant. The natural third-party reaction to any such allegation is the suspicion that a litigant is reaching for a default excuse when faced with a negative judicial decision. Some courts have gone so far as to say that the validity of a bias complaint must be sustained by evidence of a conflict of interest and not purely judicial activity. That is not the law, certainly not with respect to 28 U.S.C. §455(a), which provision stands by itself regardless of the conflict of interest language of §455(b).

Mindful of his burden,[1] Debtor built the case for bias block by block, sustained over the entire case or a substantial period. Thus, the Statement of the Case found immediately below is lengthy. Petitioner is mindful of the learning that certiorari exists not for the correction of every error or injustice below but for cases that demonstrate a degree of current importance for this Court's attention. As such, there is undoubtedly a prejudice against matters of complex facts, substantively or procedurally, but the Court is entitled to know just why this matter rises above sour grapes with judicial results. Fortunately for Petitioner's proof, the Bankruptcy Court announced its bias relatively early in the case, on June 26, 2018,

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[1] Debtor has the additional burden of appearing *pro se,* not his first choice and not how he began his Chapter 11 quest but eventually, as circumstances dictated, was forced to assume this role. Debtor is a retired lawyer who can manage within the appellate framework. Petitioner seeks no special treatment for his *pro se* status but believes that a court of equity may consider the lack of bankruptcy experience or trial expertise when dealing with procedural issues.

and reiterated its position at greater length in the opinion denying Debtor's recusal motion on March 5, 2020 – all as shown below.

The Bankruptcy Court's predetermined result and utter lack of impartiality is reasonably clear from the record stated below. The appellate process, such as it was, provides an equally compelling constitutional problem. Conclusory, dismissive rhetoric without addressing Appellant's argumentation, detailed and specific, threatens constitutional due process and bankruptcy purpose. The question for this Court, the very last arbiter in this case, is

(i) whether Debtor's motion for recusal responsibly invoked § 455(a),
(ii) whether the District Court on appeal acted appropriately and fairly rebutted Debtor's argumentation, and
(iii) whether Debtor's appeal should be heard de novo, on remand, by the Circuit Court of Appeals, under such substantive guidance as this Court may direct.

STATEMENT OF THE CASE

1. Petitioner filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §1101 *et seq.* in the U.S. Bankruptcy Court for the Eastern District of Virginia on September 7, 2017. Petitioner timely filed his Schedules, Statement of Financial Affairs, and other required documents.

2. Debtor was faced with four important (in relative size) alleged creditors: the IRS (the smallest by far); two companies, a national bank ("BoA") and what Debtor has referred to as a sophisticated loan-sharking private operation run from the law firm representing him on many matters ("HSC"); and a judgment creditor whose judgment was currently on appeal to the Virginia Supreme Court ("Roszels"). The private creditors were all seriously contested, both as to liability and amounts – long-standing disputes going back eight years or more. In particular, Bank of America was a creditor of a Virginia limited partnership of which Debtor was general partner, but not a lender to Debtor personally.

3. Petitioner remained in possession and control of his assets as DIP pursuant to sections 1107 and 1108 of the Code. No creditors' committee was appointed. Debtor timely attended his obligatory §341 Creditors' Meeting, where the bankruptcy schedules were discussed in detail and Debtor was fully transparent as to his Chapter 11 intentions with respect to challenging alleged debts, on the one hand, and developing a reorganization plan dependent upon future anticipated income, on the other.

4. On November 15, 2017, the largest contested creditor by far, BoA, filed a lift of stay motion to enforce a security interest in a property where Debtor resided but did not own, lived as a long-term tenant, and controlled through a limited partnership which was the de jure owner. Debtor contested the motion,

in an adversary proceeding, and discovery schedules were established. *Inter alia*, Debtor intended to challenge BoA's creditor status, secured or otherwise. No discovery was forthcoming by BoA despite many extensions of time and hearings and promises to the Bankruptcy Court, as well as to Debtor. In June of 2018, rather than suffer sanctions, BoA withdrew its motion for relief from stay.

5. The exclusivity period for Debtor to file a plan for reorganization initially set by statute (§1121(d)) was scheduled to expire on January 5, 2018. On January 2, 2018, pursuant to the provisions of §1121(d)(1) of the Code, Debtor filed a motion to extend exclusivity for a period to end June 5, 2018. The cause for the extension request was unresolved contingencies with respect to the Roszels and BoA. The motion was unopposed, and Debtor did not attend the hearing. The Bankruptcy Court approved the extension to June 5, 2018 by order entered February 2, 2008. The Court should note that the prior expiration date of January 5, 2018 had been tolled by filing on January 2.

6. The Debtor filed a timely motion on June 2, 2018 to extend exclusivity a second time, for four months, arguing that the same grounds which previously justified the first extension not only continued but had actually been exacerbated by the continuing actions of the two contested creditors involved. The BoA claim could not be litigated in the absence of discovery, and the Roszels claim had been tossed by the Virginia Supreme Court. Debtor set the

first available return date of June 26, 2018 to hear the motion. Debtor had no inkling of any opposition.

7. This time, two disputed creditors opposed the motion – not the largest alleged creditor, who represented nearly two-thirds of the total claims in this case – HSC filing an opposition the day prior to the opposition deadline, and the Roszels filing an untimely opposition. On June 26, a hearing was held in Bankruptcy Court on Debtor's motion. Debtor was unable to attend because of a prior legal commitment implicating his fiduciary duty to clients. Ruling from the bench, the Court denied Debtor's motion because Debtor had not established sufficient cause to extend further the exclusivity period. The Court also in its remarks made clear that this Chapter 11 reorganization case should be treated simply as a straight liquidation matter. In a short colloquy, barely a paragraph, the Court stated that the case was very simple, Debtor had no realistic income prospects, and the only possible plan was to sell the property known as Coachman Farms, pay all the creditors, and be done with it. At this point, Debtor had never personally appeared before the Bankruptcy Court. No new evidence was offered at the hearing, which consisted exclusively of lawyers "testifying." At the conclusion, the Court expressed certitude about "what Debtor wanted," namely, to live at Coachman Farms "for free." Moreover, the order finally entered on July 16 specified that the exclusivity period had terminated on June 5, 2018, thereby refusing to give effect to the long-established bankruptcy practice of tolling the deadline once an extension motion was

timely filed. Which practice was previously followed in this matter (see paragraph 5, supra). Debtor believed that such tolling was constitutionally required as part of normal due process.

8. Debtor immediately on July 3 filed a motion to reconsider the ruling from the bench. The motion asked that Debtor be allowed for the first time to testify at a new hearing, a true evidentiary hearing, and, equally important, that Debtor be allowed to file an exclusive plan of reorganization should the extension be denied, in accordance with established bankruptcy practice and constitutional due process. Debtor was present at the subsequent hearing held on July 17, 2018 to reconsider but was not permitted to testify. The Court denied the motion on procedural grounds, ruling that Rule 59(e) of the Federal Rules of Civil Procedure was not satisfied. (Bankruptcy Rule 9023 incorporates Fed. R. Civ. P. 59 and a motion to reconsider is usually treated as a motion to alter or amend under Rule 59(c)).

9. The Debtor quickly appealed to the District Court pursuant to 28 U.S.C. § 158(a)(2).

10. *The District Court refused or failed to hold a hearing or rule on the appeal for one year.* In view of the argument made below in this instant petition for certiorari, the following detail and context is provided. The expedited character of the appeal was obvious: (a) the exclusivity period is, together with the automatic stay, the main protection for a Chapter 11 debtor and absolutely integral to preparing a

successful reorganization plan; (b) the Code specifically recognized the efficacy of possible extensions; (c) §158(a)(2) allowing a quick appeal of an exclusivity denial is the only appeal of an interlocutory order under the Code provided as of right to the District Court; (d) Debtor first filed an emergency motion before the District Court for a stay pending the appeal – which the Court curtly denied; and (e) the District Court denied an unopposed motion by Debtor's counsel for a brief extension of time (days) to file his brief caused by the press of business – which the Court also denied, implicitly at least expressing an expectation for a quick resolution. The Court then inexplicitly sat on the matter for a year.

11. The appeal was finally denied on September 26, 2019 (rehearing was denied October 18, 2019), which order was timely appealed to the Court of Appeals for the Fourth Circuit. The Court of Appeals *sua sponte* denied the appeal on the grounds of equitable mootness. A petition for certiorari was eventually denied.

12. On June 21, 2018, the Roszels applied for a lift of stay to perfect a final judgment thrown out by the Virginia Supreme Court. Ordinarily, such action to continue litigation is precisely the sort of formal march that the Code's stay is intended to prevent. After a postponed hearing and extension and much confusion as to precedent, the Bankruptcy Court, unaccountably in a strict bankruptcy sense, lifted the stay.

13. Added to the prejudice repeatedly now shown Debtor were two satellite matters brought to the attention of the Court: lying to the Court and a prior breach of the stay by the Roszels. Debtor informed the Court and presented irrefutable transcript evidence that Roszels' local Virginia counsel, with bankruptcy counsel's assistance (who orchestrated a cover-up thereafter), directly lied to the Fauquier Circuit state court about the automatic stay and prior action mutually agreed upon between Debtor and the Roszels to allow them to participate in Debtor's appeal to the Virginia Supreme Court. Moreover, the Roszels through their counsel had plainly dissembled to the Bankruptcy Court about the whole incident. Debtor has never had a judicial experience such as what then occurred. The Court looked directly at Debtor and announced that the Roszels falsehood was a "technical" one and of no significance. Debtor was shocked: the Court was giving a pass to an officer of the Court directly lying to the Court *in response to a question posed by the Court.* In no sense was this fabrication inadvertent, "technical," or a misunderstanding.

14. At the same time, Debtor also put before the Court the fact of an ongoing violation of the stay by the Roszels, even as counsel was arguing for lift of stay. The violation was clear and egregious. Indeed, the Roszels sought to justify and double-down on the aggressive wrongdoing (the filing of the so-called "final order" in Fauquier Land Records even after the Supreme Court of Virginia threw it out) with no

assisting case law anywhere. When the Supreme Court of Virginia threw out the Roszel judgment, counsel declared, despite the order's language and normal legal construction, a part of the judgment remained intact and could be used actively to collect against Debtor notwithstanding the stay. To call the argument remarkable is to give it too much credit; it is patently moronic. Courts do not do such things, cannot do such things, and the idea was fanciful to the point of legal idiocy. The Bankruptcy Court shrugged and moved on: trashing the most fundamental debtor protection in bankruptcy without consequences. Not a recipe for confidence in judicial impartiality or attention to business.

15. Meantime, the United States Trustee ("UST") filed a motion to convert the Chapter 11 case to Chapter 7 on May 9, 2019. The movant has the burden of proving that cause existed for conversion. The UST gave as grounds for conversion three alleged failures by Debtor as a DIP: Debtor had caused loss to the estate; Debtor had engaged in "gross mismanagement of the estate;" and Debtor had "failed to confirm a plan of reorganization by statutory or Court-imposed deadlines." Both in its many papers and at the hearing held on the conversion in June 2019, the UST failed to allege or produce any evidence whatsoever for Debtor's alleged failures, which problem was recognized by the Bankruptcy Court itself at the June hearing, but the Court stated its determination "to fill in the blanks." In essence, the Court then ruled that Debtor had failed to provide a viable Disclosure Statement/Reorganization Plan,

that Debtor's proposed sources of income were too risky or speculative.

16. The order for conversion was executed on June 24, 2019, or so all the parties thought. An earlier version issued June 13 also facially purported to be the final order for conversion.

17. Debtor appealed the order of conversion using the executed version of June 24, 2019 to calculate the 14-day period mandated by statute for filing a notice of appeal. Before appellate briefs were filed (but well after Debtor's statement of issues and designation of the record was filed), the UST filed a preliminary motion for dismissal of the appeal, alleging that Debtor had missed the statutory deadline of 14 days for filing the notice of appeal because he had used the wrong order.

18. Debtor would later testify to the District Court that all the parties and the Bankruptcy Court itself understood that the order of June 24, 2019 was to be the operative order, replacing the initial order of June 13, which order was deemed incomplete. Debtor gave several facial reasons why the changes were substantive and the new order a genuine replacement. The Debtor also made the essentially equitable argument that the intent of all the parties was clear and that due process policy grounds of preferring that appeals be heard on their merits and that the small delay of 11 days between the two orders was meaningless, certainly nonprejudicial, as a practical matter.

19. The District Court held, however, that the earlier of the two orders was the operative order because facially the difference between the two orders was insignificant in substance. The District Court expressed sympathy for Debtor's equitable presentation but noted that jurisdictional mandates knew no equitable boundaries and concluded that the appeal must be dismissed.

20. Debtor appealed to the Court of Appeals. On April 20, 2020, the same day that the Court of Appeals ruled on the exclusivity appeal, the Court also dismissed the conversion appeal. A petition for certiorari was later denied.

21. As noted previously, before the UST filed its conversion motion, Debtor on April 30, 2019, filed his Disclosure Statement and Reorganization Plan ("DS/P") and a hearing in Bankruptcy Court was set for May 28, 2019. The IRS, BoA (now Wilmington Savings), and HSC all filed objections to the DS/P. The full transcript of the hearing must be read to appreciate the extensive presentation by Debtor and the limited specificity of the alleged creditor inquiries. The alleged creditors called no witnesses and introduced no exhibits. The Court emphasized that it was clear that Debtor's proposed supporting income was too speculative to support a Reorganization Plan. An Order denying the DS/P was signed on May 30, 2019.

22. The heart of the denial was that Debtor's financial projections were simply too speculative, a flaw that would obviously entail a substantial revision of the Plan. Nevertheless, Debtor was given only five days, including a weekend, until June 6 to file an amended plan, with a hearing to be held on June 11, 2019, which day, not coincidentally, was the hearing date previously established for the UST's conversion motion.

23. Recognizing the obvious – the designed futility of attempting to comply in so short a time with a plan revision – Debtor filed a notice of appeal on June 13. The basis for appeal was, *inter alia*, (i) the erroneous denial of Debtor's DS/P using a non-statutory standard and (ii) the Order allowing only five days to cure, a sham and a violation of due process. The appeal also alleged clear bias and predetermination by the Court for liquidation of Debtor's residence, not actually an asset of his estate.

24. Before briefs could be submitted, the UST filed a preliminary motion to suspend the briefing schedule and dismiss the appeal for failure of jurisdiction:

a. The Order of May 30, 2019 was interlocutory.
b. Under 28 U.S.C. 1292(b), the best analogy for weighing discretionary review, no compelling reason for discretionary review by the District Court could be found.
c. Mootness attached caused by conversion.

The District Court ordered on September 9, 2019, after canceling at the last minute on three separate occasions a hearing, in a short opinion that the UST Motion should be granted.

25. Debtor filed a motion to reconsider on September 23, 2019, stressing the importance of appellate review and the context of an individual debtor now struggling *pro se* with Chapter 11. The District Court denied reconsideration on October 18, 2019.

26. Debtor appealed to the Court of Appeals on November 18, 2019, filing his informal brief on December 16, 2019. In its informal reply brief, the UST added an additional argument: the Court of Appeals lacked jurisdiction to review the District Court's discretionary refusal to grant an interlocutory appeal of the Bankruptcy Court Order despite the clear text of 28 U.S.C. §158(d)1, citing *In re Kassover*, 343 F.3d 91 (2d Cir. 2013).

27. In a one-page order issued on August 24, 2020, the Court of Appeals said that under 28 U.S.C. §158(d)(1) the Court had jurisdiction only if both the Bankruptcy Court and the District Court issued final orders and that *Kassover* was precedent that the District Court's order was not a final order. The Court of Appeals also agreed with the mootness alternative.

28. Petitioner moved for *en banc* rehearing but was turned down on November 2, 2020. Certiorari was subsequently denied.

29. On February 19, 2019, Debtor as DIP filed in a Virginia state court a lengthy, multi-count complaint, against various Virginia defendants, that *inter alia* challenged under Virginia law the claims made by HSC and the Roszels, either liability directly or as to amounts by offsets. To avoid confusion, this litigation will simply be referred to herein as the *Morrison* case.

30. One defendant in *Morrison* appearing only in a single count removed the case to the Bankruptcy Court as an adversary action in Debtor's Chapter 11. The removal was arguably premature (service of the defendant had not yet been made and issues as to venue in Virginia were unresolved[2]) and otherwise wrongful – at least attracting mandatory abstention and remand.

31. In a lengthy hearing held on May 21, 2019, the Bankruptcy Court summarily denied Debtor's objections to removal, refused to consider abstention or remand, heard multiple defendant motions to dismiss their counts, and brushed aside Debtor's several grounds of denial of due process. Two counts were summarily dismissed without full or coherent reasons given; the remainder taken under advisement. The entire hearing was a confused circus and due process nightmare.

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[2] The entire Fauquier Circuit Court had recused itself and a formal request was opened to the Virginia Supreme Court to certify another venue.

32. Debtor was represented by bankruptcy counsel throughout up to this point but appeared *pro se* in all appeals (after the exclusivity appeal) by agreement with counsel and approval of the Court. Over strenuous objection by Debtor, the Court proceeded here without Debtor's counsel present, forcing Debtor to appear *pro se* or not at all. The full details of all this and the many basic due process violations at this time cannot be adequately described without adding many pages to this petition. Debtor at every opportunity repeated his objection to being compelled to proceed without bankruptcy counsel.

33. After conversion to Chapter 7, prosecution of the *Morrison* case was taken over by the Chapter 7 Trustee. The Trustee appeared at status calls set by the Court to report on his investigation of the various counts, a reworking of the complaint language, and possible settlements. Debtor was not notified of at least two such status hearings and, ignorant altogether of the hearings, did not appear. When Debtor subsequently complained to the Court of such ex parte communications with the Chapter 7 Trustee, the Court announced that it was under no obligation to notify Debtor, who had lost his standing in such matters. Debtor learned at this time from the Chapter 7 Trustee that the Bankruptcy Court had urged, ex parte, the Trustee to take up the *Morrison* matter formally.

34. Faced with what threatened to be the complete loss of the *Morrison* litigation, a matter of immense importance to Debtor, and equally the breakdown of

the appellate process to rectify clear and continuing substantive errors on essentially procedural grounds, Debtor determined to file his motion for recusal. The motion was filed on January 21, 2020.

35. In the hearing on this motion, the Bankruptcy Court in a prepared order denied Debtor's motion. The memorandum opinion denying recusal is reproduced in Appendix D. This opinion and text taken from this opinion evidencing the very bias complained of is discussed at length below.

36. Debtor appealed the denial to the District Court. In the course of the appeal, the matter was taken over by Judge Trenga, the same judge who was responsible for the exclusivity appeal delay and subsequent equitable mootness. The appropriateness of Judge Trenga's appearance is discussed below.

37. The District Court denied the appeal and affirmed the Bankruptcy Court, which opinion is discussed at length below and is reproduced in Appendix C.

38. Debtor filed a motion to reconsider, which included a plea to Judge Trenga to recuse himself pursuant to 28 U.S.C. §455(a). The Court denied the motion and ignored completely the recusal request.

39. Debtor then filed an appeal to the Fourth Circuit Court of Appeals, who eventually denied the appeal and a following motion for a rehearing. The

Circuit Court of Appeals posture herein is also argued below.

40. The denials by the Circuit Court of Appeals have led to the filing of this Petition for Writ of Certiorari.

REASONS TO GRANT THE PETITION

I. The Bankruptcy Court in Its Own Words Has Clearly Admitted the Bias.

As noted earlier, the Bankruptcy Court was not shy in announcing its bias. At the second exclusivity extension hearing, the Court without hearing a word from Debtor personally[3] announced that Debtor had only one significant asset – his residence at Coachman Farms. "Debtor thinks he is moving forward in his reorganization but he is not," the Court declared, ignoring that the exclusivity period was being employed precisely as designed to develop information to support a meaningful plan. Debtor's only choice, the Court emphasized, was to sell Coachman Farms and pay off his creditors.

Why was the Court's emphasis not simply a fair conclusion of the obvious? Because Debtor simply did

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[3] The hearing was characterized chiefly by creditor counsel making speeches as to "evidence" not before the Court or in the relevant record. Over Debtor's objection, counsel for the Roszels was allowed to "testify" even though he had failed timely to make a written objection to Debtor's motion. The Court's failure to hold the creditors to the same strict procedural standards as Debtor is but one remarkable feature of this litigation.

not own Coachman Farms. Some fifteen years earlier, Coachman Farms had been taken from a testamentary trust established by Debtor's father in a reformation after the latter's death and put into a Virginia limited partnership for estate taxation purposes. Debtor was a general partner of the partnership. The partnership, again a creation of state law, owned Coachman Farms and was the borrower from BoA. Debtor lived on the property as a long-term tenant. Debtor had an equitable interest in the partnership but did not own the assets of the partnership. The Court disapprovingly declared that it knew what Debtor wanted – to live at Coachman Farms "for free." (In fact, Debtor obviously had been supporting Coachman for years with large infusions of working capital.) In fact, Debtor had made clear that he was prepared to use Coachman Farms, should the partnership's creditors so agree, as a sort of guaranty or backstop to a reorganization plan – simply that if the income anticipated was not forthcoming, then Coachman could be sold or refinanced. Debtor did not have to make such a preliminary offer; the purpose would be to make the plan more attractive to secure buy-in from creditors. The perhaps unique position of Coachman Farms had not been discussed with the Court, and the Court's assumption of Debtor ownership was simply wrong and a matter of state law quite beyond bankruptcy control.

But the real detail to its preconception and evidence of a deep-seated antagonism toward Debtor making a fair judgment impossible was provided by the Bankruptcy Court in its opinion of March 15, 2020

denying the recusal motion. Petitioner quotes in full the key passage:

> *Throughout this case, the debtor has maintained that, even though he controls the entities [sic] that own his residence, he has no more than an equitable interest in Coachman Farms and therefore it should not be treated as property of the bankruptcy estate. However, he treated the property as his own when, in his disclosure statement he proposed to offer the property as security for his promises to pay the creditors whose claims he continues to dispute. In other words, the debtor intended to keep enjoying all of the benefits of owning [sic] Coachman Farms without acknowledging in his plan the rights of those creditors and without a firm commitment to pay for his residence. This behavior is inconsistent with the conduct of the poor but honest debtor that the Bankruptcy Code is designed to protect.*

Here, in a nutshell, is the bias: a dishonest and unworthy debtor is "gaming" the system. Logically, however, the fact that Coachman Farms was the residence of Debtor was quite irrelevant to ownership and partnership status under Virginia law. The Judge's pronouncements were extreme and provocative.

Previously to the recusal motion, the Court had ruled[4] that Coachman Farms was covered by the automatic stay as the logical result of, or protection for, Debtor's equitable interests. The Court may have been mistaken in granting such broad protection absent ownership, but Debtor never tried to hide the fact that his argument for stay protection was a practical one of protecting partnership assets in which he had only an equitable interest.

In fact, here we have – in a passage (or vent) that is not even relevant to the recusal motion, except to justify what the Court had been doing all along – the Court's justification for pushing any scenario that would lead to liquidation of Coachman Farms and providing a less than honest Debtor with what he "deserved." A more glaring example of bias would be difficult to imagine.

II. The Library or Catalogue Evidencing the Bias.

At the outset, it must be emphasized that §455(a) is quite distinct from §455(b). §455(a) refers to disqualification when impartiality "might reasonably be questioned." §455(b) is an "also" provision that refers to more specific conflicts of interest. The Bankruptcy Court wrongfully declared in its opinion denying recusal that Debtor's motion

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[4] Dicta in an order dealing with lift-of-stay is not considered in bankruptcy controlling law outside the issue of maintaining the stay.

was based upon supposed conflicts of interest (i.e., §455(b)), which Debtor did not identify.

In fact, Debtor set forth a substantial list of actions and orders that evidenced bias. Debtor was careful to examine each example not simply for an adverse result but for the extreme and often simply unreasonable result, an outcome Debtor suggests is explainable only by or most reasonably by the bias described. Equally telling is that the Court in its memorandum opinion does not deal directly with a *single* example of bias listed by Debtor. The entire memorandum opinion is general as to bias disqualification and entirely conclusory with respect to this case.

The only statement that the Court makes that relates directly to the evidence of the case advocated by Debtor is the suggestion that Debtor has not had any success on his frequent appeals to the District Court. The implication is that bias without error is an impossibility. In his detailed "Statement of the Case" above, Debtor shows that none of the appellate examples given validates the merits of the action taken. All Debtor's losses on appeal were procedural in nature. The merits were never reached.

Petitioner does not want to duplicate the information already supplied in the Statement of the Case, but a quick survey of extreme positions is appropriate, including a reminder of whether an appeal ever reached the merits of the Bankruptcy Court action.

(a) **The exclusivity denial**. The failure of the Court to use its equitable tools, after

admitting that a continuance would have been granted if only Debtor's counsel had asked, to provide more information needed, was shocking. Additionally, the denial of normal tolling was especially outrageous and constitutionally unjustifiable. HSC was waiting in the wings with a liquidation plan once exclusivity was lost and reorganization with it.[5] Judge Trenga's treatment of the appeal, particularly the delay, speaks for itself, though we will return to it below. When the appeal finally reached the Court of Appeals, the doctrine of equitable mootness ended the madness. It is important to realize that using equitable mootness invariably means that the debtor was correct on the merits – just too much trouble and third-party unfairness to stick to the action demanded by the facts.

(b) **The denial of the DS/P** was equally extreme. It must be tempting for bankruptcy judges to look for reasonableness or less risk in plans and to drive confirmation accordingly. The law – the statutory provisions – is otherwise. Judges are not supposed to act as ringmasters or super consultants and weigh in on the likelihood of success. A conforming plan deserves a vote by

[5] HSC's proposed plan died because it depended upon the sale of Coachman Farms.

creditors, not by judges who have truly limited experience and knowledge to be playing hedge fund principals. Adequacy of information is the plain statutory test, not "risk." Perhaps the most shocking part of the DS/P denial was the five-day cure offered, a sure sign of bias and driving a case to a predetermined result.

(c) **The conversion to Chapter 7** was as scarcely believable an example of bias. To allow the UST to time such a motion prior to the DS/P outcome was wrong but to allow such a motion to succeed when a "cause" required was just made up to fit the statutory language, is not a part of bankruptcy purpose, and resembles more a Fifth Amendment taking. The truth is that the statutory scheme envisages dismissal of a nonconforming Chapter 11 effort unless true "cause" is appropriate to penalize a debtor for harmful tactics. The conversion appeal died a particularly bloody procedural death.

(d) **The Roszel lift of stay** was not justified, and such unexplained steps away from major guideposts (the stay) are hardly signs of impartiality. Linked to the basic Roszel problem are the two satellite episodes: (i) the **lying to the Court** and (ii) the earlier – and continuing – **breach of the statutory automatic stay** both stand out as particularly egregious. Courts that allow such misbehavior to slip by have agendas

beyond strict bankruptcy purposes and a limited understanding of precedent.

(e) The *Morrison* adversary proceeding began badly and quickly went downhill. Denial of bankruptcy counsel, ex parte activity, judicial activism – all extremely serious issues pointing to a confirmation of bias and the role assumed by the bankruptcy court of shadow prosecutor.

III. Judge Trenga's District Court.

Judge Trenga's role in the exclusivity matter has been laid out in some detail above. The delay was inexplicable – certainly, Judge Trenga has never offered an explanation. The appeal's duration emboldened a bankruptcy court when a salutary warning could have preserved bankruptcy purpose: a fresh start for a good faith debtor. The verdict of equitable mootness is not a badge of honor but instead a recognition of a highly damaging result that survives only because its reversal or cure would under the circumstances cause even more harm and confusion.[6]

Equally inexplicable is why Judge Trenga became the default choice for the appeals in this bankruptcy following such a disastrous start. Never was there a more damaging reality then the natural expectation that having orchestrated the original

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[6] Judge Trenga invented the concept of "equitable tolling" to explain what had happened, a term previously unused in such a context – a year's wait to read a nonexistent legal fiction!

failure of a Chapter 11 case, the interest in pushing the conversion to a Chapter 7 is inescapable. Indeed, short of an actual conflict of interest, the Judge's lack of impartiality to a litigant damaged earlier is more than "reasonable" – rather, it is inevitable.

Judge Trenga is a respected senior judge at the District Court. His actions in this litigation, however, have been truly mysterious – logical speculation about protecting a green bankruptcy judge is probably inappropriate and fortunately not necessary under §455(a). The unfortunate appellate delay referenced caused enormous damage to Debtor and indeed is arguably the seminal event that helped launch this whole *Jarndyce v. Jarndyce* experience (the equitable mootness curtain). What debtor in his right mind would want Judge Trenga to continue to hear appeals in this matter? What would be the reasonable human expectation as to bias in justifying the cause so far? Judge Trenga's continued participation makes a mockery of the concept of "fresh eyes." The result – "I agree with the court below," without more, without the courtesy of a direct reply to an earnest, obviously good faith appellant – says it all.

When Debtor saw that Judge Trenga was holding himself out as someone whose experience in the case qualified him as the most suitable District Court judge to hear Debtor's appeals, Debtor came forward to ask directly for Judge Trenga's recusal. The first time was in the conversion appeal in the Debtor's motion for reconsideration. Judge Trenga, however, did not respond – just did not mention same, not a word. In fact, Judge Trenga prefers, in Debtor's experience, to state the general jurisdictional and

legal parameters and then "agrees" with the Bankruptcy Court without more – that is, using the phrase "for the reasons given below" or similar verbiage. Debtor realizes that this technique is frequently used by many courts, but one is entitled to wonder in many instances whether this intellectual short-cut (or laziness) is the 'fresh eyes' intended in our constitutional framework of one appeal as of right. A genuine appeal presupposes responsive reasons given for a result.

In the Bankruptcy Court recusal litigation, Judge Trenga provided a more telling example of a faux appeal. Debtor's motion for recusal to the Bankruptcy Court was 43 pages long, with examples and justification carefully supplied. A shortened, separate but still detailed motion for Judge Trenga's recusal was also provided. As we have seen above, the Bankruptcy Court in its reply chose not a single example given to analyze and rebut. The rebuttal effort was simply an exercise in conclusory rhetoric. We have seen how the Bankruptcy Court failed to draw the necessary distinction between §455(a) and (b). Judge Trenga repeats the latter fiasco, asserting that Debtor was making or supposed to be making a case for conflicts of interest. That is false; Debtor specifically said that he knew of no provable conflict of interest. §455(a) does not require it. To say so or pretend that Debtor himself took on such a burden is dishonest. Judge Trenga insists that the Bankruptcy Court carefully examined the record and responded in detail. That is a false reading of the Bankruptcy Court's opinion.

The statutory bankruptcy scheme provides an appeal of right for final orders. For whatever reason, Judge Trenga is in constitutional denial of his duties in this matter. As to the motion for his own recusal, the resulting 'rebuttal' was even more conclusory. Above all, a court must give a recusal motion due consideration if presented in good faith. There are no shortcuts to dealing with legitimate concerns of bias.

IV. Richmond's "Boneless Wonder."

Among many things, Churchill is noted for his wit, and perhaps one of his most notable quips was the story of the "boneless wonder." At a sufficient level of abstraction, he was referring to someone who disappointingly does not measure up to premises or expectations, even to the point of uselessness.

In the same vein, Ross Perot in the one presidential election in which he took part as a candidate when asked what had surprised him the most replied that he recalled a great many surprises but to be called a liar in a debate by Bill Clinton was perhaps the biggest wonder of all.

In this litigation, Debtor has had recourse to the Circuit Court of Appeals several times. The first foray produced the (unconstitutional) equitable mootness, a boneless wonder if ever one existed. Subsequent tries – hundreds of pages of "informal briefs"[7] versus the inevitable per curiam paragraph "No error here." It is difficult to convey the

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[7] A special designation used to emphasize *pro se* litigants and possibly a scarlet letter.

disappointment when one of the highest courts in the land states that they agree with Judge Trenga's analysis, period. Whatever the constitutional due process that the Circuit Court of Appeals is supposed to provide bankruptcy litigants – and the role may be higher than normal because of the perception that the District Court and Bankruptcy Courts are really one and the same court (a suspicion nurtured by this Court's own jurisprudence) – it cannot possibly be satisfied by the intellectual dishonesty of these per curiam paragraphs.

The position of trial judges is unique – as a group they enjoy vast authority over fellow Americans. The primary defense against abuse of this authority is their internal commitment to impartiality – a dedication to hear both sides with an open mind and then deciding without prejudice. This is a constitutional requirement of judicial office. Oversight by appeals could not be more important and necessary. Good faith appellants deserve as a matter of due process substantive responses.

V. The Importance of Supreme Court Review.

Criminal law issues today crowd out civil law concerns in the media, and political hot topics seem to define Supreme Court terms. But American civil society is also based upon the rule of law. That law relies upon the courts for actual enforcement, as well as guidance to those inclined to learn the law. The courts must make room in their dockets for civil traffic along with criminal matters and hot-button

issues of the day. The courts to work effectively and fairly depend upon impartial judges. The Supreme Court has no more important task than to do what it can to ensure that judges understand what is expected of them and comply with the ethical boundaries that define impartiality.

Impartiality is not necessarily self-defining, and the federal system which the Supreme Court oversees has chosen both specific guidance such as that found in 28 U.S.C. §455(b) *et seq.* but also straightforward broad prophylactic such as §455(a), where the test of impartiality is left to the infamous third-party objective observer who might question in the circumstances (for example, the shoes of the litigant) impartiality on a "reasonable basis." If a judge's impartiality "might reasonably be questioned," he (she) "shall" disqualify himself. Impartiality, bias in fact need not be proved, only the appearance of prejudice. The objective standard seeks to encourage not only actual impartiality but also the appearance of impartiality.

If the bias is allegedly manifested solely from judicial proceedings, the courts have historically looked for systemic or recurring evidence over a substantial period or the display of deep-seated antagonism (or favoritism) making fair judgment impossible. See *U.S. v. Carmichael,* 726 F.2d 158 (4th Cir. 1984). Of course, Debtor-Petitioner here has met that standard. Petitioner's proof goes far beyond his subjective feelings of bankruptcy disappointments.

That the Supreme Court cannot possibly investigate every single charge of bias that rears its head is a false choice or test when looking at

certiorari. By particularly focusing on egregious but teachable litigation, this Court may well energize the lower appellate courts, which in turn will ride herd on trial courts. If freedom requires a little patriot blood be spilled from time to time, the moral compass of the court room requires some deterrence or guidance by appropriate example.

Recently, the Chief Justice has made clear that a judge's impartiality within the federal system is a priority of significant concern, including the appearance of impartiality. The Chief Justice is well aware that internal policy is the strongest bulwark to judicial independence; as well as integrity. This Court must not shy away from a leadership role with regard to §455(a) or (b). The former is the more difficult and hence the greater need for activism. There can be little doubt that taking §455(a) seriously will be a strong encouragement to maintaining the independence of the judiciary.

CONCLUSION

The writ of certiorari should be granted. Debtor asks this Honorable Court to remand this Case to the Court of Appeals for the Fourth Circuit and using the objective standard of §455(a) decide de novo whether Appellant-Petitioner has established an apparent pervasive bias or deep-seated antagonism toward Debtor that objectively serves as a reasonable basis for the Bankruptcy Court's disqualification. If the necessity for recusal is found, the bankruptcy proceedings beginning with the second exclusivity

extension and the conversion to Chapter 7 should be reopened and determined de novo.

Respectfully Submitted,

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