No. 21-1253

IN THE

Supreme Court of the United States

PHILIP JAY FETNER,
Petitioner,

v.

KEVIN R. McCARTHY, TRUSTEE
&
WILMINGTON SAVINGS FUND SOCIETY, CREDITOR,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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March 10, 2022

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QUESTIONS PRESENTED

This matter concerns the purported settlement of legal causes of action allegedly owned by a debtor as part of a bankruptcy estate. Petitioner asks this Court to review the following questions:

(i) Did the Chapter 7 Trustee fail to provide transparency and observe its fiduciary duties to Debtor, all as allowed by the Bankruptcy Court?

(ii) Did the Bankruptcy Court further violate Debtor's due process rights in approving the Settlement?

(iii) Was the Settlement ordered outside legitimate bankruptcy purpose under the Code and contrary to the law of *Stern v. Marshall*?

(iv) Was the accompanying Bar Order also overbroad and unconstitutional?

(v) Did the District Court fail to abide by the mandate of 28 U.S.C. 455(a) and also fail to address Debtor's appeal?

In the Petitioner's view, the so-called "Wilmington Settlement" was prepared by a Chapter 7 Trustee on a desperate pecuniary quest operating without regard to transparency or its fiduciary duties, and was imposed by a bankruptcy court, which in a fog of bias acted as a shadow prosecutor and violated Petitioner's fundamental constitutional due process. The Bankruptcy Court approved not only a sham compromise over which it had no final jurisdiction under *Stern v. Marshall* or legitimate bankruptcy interest but which also included an unconstitutional overbroad bar order unrelated to bankruptcy purpose.

Along the way in the so-called appellate process, a compromised District Court refused to recuse itself under the clear mandate of 28 U.S.C. §455(a) and failed egregiously as well to consider the merits of Debtor's actual appeal. The importance of the Supreme Court accepting this review is also argued below in Reasons To Grant the Petition.

This Petition is the fourth effort for a writ of certiorari by Debtor in his bankruptcy litigation. The first petition was filed September 28, 2020 (No. 20-1117) seeking a determination that the invocation of equitable mootness was unconstitutional and that the failure to apply equitable jurisprudence to procedural matters determining conversion of the original Chapter 11 reorganization filing to a Chapter 7 liquidation was erroneous. The second petition was filed on February 1, 2021 (No. 20-1096) challenging the application of preliminary jurisdictional principles to prevent an appeal on the merits of disqualifying a Disclosure Statement/Reorganization Plan by the Bankruptcy Court. The third petition was recently filed on February 22, 2022 (No. 21-1177), where Petitioner challenges the failures to recuse pursuant to 28 U.S.C. §455(a).

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. Wilmington Savings Fund Society 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. McCarthy, Plaintiff
v.
Hotel Street Capital, LLC, *et al.*, Defendants

Case No. 17-13036-KHK
Chapter 7 (Conversion)

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JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion in Appeal No. 21-1629 on November 19, 2021. The Chief Justice extended the time for filing this Petition to March 11, 2022.

Jurisdiction 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-C. The opinions are unreported.

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III and the First, Fifth and Fourteenth Amendments to the Constitution. Bankruptcy Code. 28 U.S.C. §455(a).

INTRODUCTION

In describing reasonably succinctly the procedural history of this matter, how the facts of this case have brought Petitioner to the relief requested herein, one dominant theme, if not emphasis, of this Petition is the status of Coachman Farms, the name given to the 50-acre upscale horse farm where Fetner lived when he filed for Chapter 11 bankruptcy in 2017.

The legal status of Coachman Farms is objectively straightforward and determined, as is all private property in America, by state law where the real property is located, in this instance Virginia. Since 2003 and at all material times herein, Coachman Farms was owned by a family limited partnership established in Virginia and so registered in the local land records kept in the Fauquier Circuit Courthouse. Pursuant to a Rule 2004 examination, Fetner produced some 20 years of federal and state income tax filings for the partnership and Coachman Farms. Fetner was both the general partner and a limited partner of the partnership and lived on the property as a long-term tenant.

Early in the bankruptcy, evidence was introduced – although no formal determination in court was so made – that because of an inadvertent or careless failure to pay a yearly administrative fee to the Virginia Corporation Commission in 2011 and never cured, the partnership was technically in a state of dissolution, with Fetner operating as a partner or trustee-in-dissolution. The partnership continued, however, to function, at least for the purposes of dissolution. Under local partnership law, Fetner was never the owner of Coachman Farms but held an equitable interest in the limited partnership that actually owned the property. The ownership of its assets strictly by the partnership and not by its partners in a fundamental tenet of state partnership law in Virginia and elsewhere.

Early in the Chapter 11 case, the Bankruptcy Court in a hearing to extend the exclusivity period surprisingly volunteered that this case likely would not qualify for reorganization but should be viewed as a straightforward liquidation of Coachman Farms for the benefit of Fetner's creditors. Later, after the Bankruptcy Court converted the case to Chapter 7, Debtor filed a motion for recusal of the bankruptcy judge. The Bankruptcy Court in denying the motion admitted that its view of the case was that Fetner was dishonestly gaming the bankruptcy process by controlling Coachman Farms and including it as an asset in his reorganization plan but wanting to remain living at Coachman without any obligation therefor beyond what was proposed in the reorganization. (The Court did not believe that Debtor could propose a workable plan.) Obviously, the Chapter 7 Trustee and creditors took their cue from the Bankruptcy Court's announced predilection.

The denial of the recusal motion and its appellate history is the subject of a petition for a writ of certiorari filed February 22, 2022. Debtor does not propose to duplicate that litigation here. Debtor asks only that this Court take judicial notice of a thorough and reasonable allegation of bias in this case. It is impossible to discuss the full context here without alluding to "bias" motivating a court to act as a shadow prosecutor, and Fetner here does not want to be seen as throwing the term around loosely. The wrongful disposition of Coachman Farms is the unifying theme of this entire case. The truth is, this case in large part is the story of how a trial court, with permissive appellate courts, drove the liquidation of

Coachman Farms without formally determining in an adversary proceeding that Fetner actually owned the property.

The full context to understand this story requires a lengthy Statement of the Case.

STATEMENT OF THE CASE

1. Petitioner filed an individual 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. Fetner 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 private loan-sharking operation run from the law firm representing him on many matters ("HSC"); and a judgment creditor whose judgment was then on appeal to the Virginia Supreme Court ("Roszel"). 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 PJF Limited Partnership ("PJF"), of which Debtor was general partner, but not a lender to Fetner personally.

3. Fetner 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 both challenging alleged debts and developing a reorganization plan dependent upon future anticipated income. Fetner thereafter abided by all the Chapter 11 rules and procedures of the Code.

4. On November 15, 2017, the largest contested creditor by far, BoA, filed a lift-of-stay motion to enforce a security interest in Coachman Farms. Debtor contested the motion, in an adversary proceeding, and discovery schedules were established by the Court. *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 §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 Roszel and BoA. The motion was unopposed, and Debtor did not attend the hearing. The Bankruptcy Court approved the extension by order entered

February 2, 2008. This Court should note that the prior expiration date of January 5, 2018 was treated as tolled by the 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 actions of the two contested creditors involved. The BoA claim could not be litigated in the absence of discovery, and the Roszel claim had been tossed by the Virginia Supreme Court. A return date of June 26, 2018 was set to hear the motion. Debtor had no inkling of any opposition.

7. This time, two creditors opposed the motion – HSC filing the day prior to the opposition deadline, and Roszel filing an untimely opposition. On June 26, a hearing was held on Debtor's motion. Fetner was unable to attend because of a prior legal commitment. Debtor's counsel failed to ask for a continuance so that Debtor could testify, if necessary, as to matters for which only he could reliably provide probative evidence. 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 remarkably announced that this Chapter 11 reorganization should be treated simply as a straight liquidation matter. In a short colloquy, barely a paragraph,[1] the Court stated that

[1] See Transcript, July 17, 2018, page 18.

the case was very simple, Fetner 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." 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 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)). The Court admitted that it would have granted a continuance on June 26, if only Fetner's counsel had asked!

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.* 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 recognizes the efficacy of repeated possible extensions, up to 18 months in total; (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; (d) Debtor first filed an emergency motion before the District Court for a stay pending 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 because of the press of business – implicitly at least creating 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 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, Roszel applied for a lift-of-stay to perfect a final judgment to replace the one 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. 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 Fetner and the limited specificity of the alleged creditors' inquiries. The alleged creditors called no witnesses and introduced no exhibits. The Court declared, however, that it was clear Debtor's proposed income was too speculative to support a reorganization plan. An Order denying the DS/P was signed on May 30, 2019.

14. The heart of the denial was that Debtor's financial projections were simply too risky, a flaw that would obviously entail a substantial revision of the DS/P. 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 a conversion motion by the United States Trustee ("UST"), discussed below.

15. Recognizing 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 in Debtor's view 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.

16. 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.

17. 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.

18. Debtor appealed to the Court of Appeals on November 18, 2019, filing his informal brief on December 16, 2019. In its 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).

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

20. Meantime, the UST had 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 moving 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 so-called failures, which problem was also recognized by the Bankruptcy Court at the June hearing, but the Court stated its determination "to fill in the blanks" itself. In essence, the Court then ruled that Debtor had failed to provide a viable DS/P and that Debtor's proposed sources of income were too speculative. The UST's alleged causes based upon Fetner's failures as a DIP and missed statutory deadlines were simply dropped.

21. 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 order for conversion.

22. Debtor appealed the conversion using the executed order 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 because he had used the wrong order.

23. 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 first order was deemed incomplete at the time. 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.

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

25. 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 summarily dismissed the conversion appeal. (A petition for certiorari was later denied.) At every turn, Debtor's appeals on the merits of what was happening in the Bankruptcy Court – the inexorable forward march to liquidation under Chapter 7 – were

being denied on procedural grounds. All possible equitable relief was being denied.

26. On February 19, 2019, well before conversion, Debtor as DIP filed in a Virginia state court a lengthy, 14-count complaint, against 12 various Virginia defendants, that *inter alia* challenged under Virginia law the claims made by HSC and Roszel, either liability directly or as to amounts after offsets. To avoid confusion, this litigation will simply be referred to herein as the *Morrison* case.

27. 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.

28. 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

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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 uncompromised venue.

advisement. Objectively, the entire hearing was a confused circus and due process nightmare. All without Fetner's bankruptcy counsel present.

29. 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 on May 21 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.

30. After conversion to Chapter 7, prosecution of the *Morrison* case was taken over by the Chapter 7 Trustee. The Trustee indicated to the Court that the *Morrison* case appeared to have value and that the Trustee needed time to evaluate its position. The Court granted a lengthy standstill. The Trustee thereafter 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 and control the litigation.

31. 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, Fetner determined to file a motion for recusal. The motion was filed on January 21, 2020.

32. In the hearing on this motion, the Bankruptcy Court in a prepared order denied Debtor's motion. The memorandum opinion denying recusal is remarkable for restating with some clarity the very bias discussed above:

> *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.*

33. 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 was challenged and is discussed below.

34. The District Court denied the appeal, 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.

35. Debtor then filed an appeal to the Fourth Circuit Court of Appeals, who eventually summarily denied the appeal and a following motion for a rehearing. (The denials by the Circuit Court of Appeals led to the filing of the previously disclosed Petition for Writ of Certiorari.)

36. 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 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. But Debtor simply did 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 in 2006. 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 Bankruptcy 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 an 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 previously been discussed with the Court in an adversary setting. But the real preconception and arguably evidence of a deep-seated antagonism toward Debtor was provided by the Court in its opinion of March 15, 2020 as set forth in paragraph 32 above. Here, in a nutshell, was the bias: a dishonest and unworthy debtor is "gaming" the system.

37. While the case was still in Chapter 11, Wilmington pursued another lift-of-stay in early 2019. BoA/Wilmington[3] took the contradictory position that although it was a secured creditor of Debtor – an assertion as we have seen that Debtor strongly denied from the outset of the bankruptcy – Debtor's legal argument that he was not the owner meant that the automatic stay never had applied to Wilmington (BoA). The Court will recall that BoA/Wilmington withdrew an earlier motion for lift of stay, after refusing to engage in discovery. Debtor countered that the automatic stay of §362 protects

[3] The timing of the transfer of BoA's claim to Wilmington Saving Funds Society ("Wilmington") is not entirely clear. Wilmington produced documents that purported to show a transfer in June of 2018. Federal law requires that a borrower must be immediately notified when a lender sells, assigns, or otherwise transfers ownership of a mortgage loan. Neither BoA nor Wilmington (or Shellpoint, the mortgage servicer) notified PJF or Debtor of the changeover. Debtor's many requests at hearings and in various motion responses for information clarifying Wilmington's exact status went unanswered. Over two years later, on July 16, 2020, Shellpoint on behalf of Wilmington/BoA sent PJF a notice that the loan had been transferred on June 30, 2020. Debtor has made this notice part of the record in this case.

"property of the debtor" *and* "property of the estate" – there is a difference. Protecting Coachman Farms was the only practical way to protect, as bankruptcy law intended, Debtor's equitable interest in PJF. Such protection did not, however, somehow convey Coachman Farms itself to Debtor's bankruptcy estate of §541.[4] Wilmington's written brief and oral arguments at the hearing on lift of stay were a study in confusion. Counsel argued both possibilities – namely, that Debtor somehow had come into possession of Coachman Farms by operation of law, by the passage of time, or by the partnership articles, on the one hand, or that Debtor was correct and never owned Coachman Farms. Either way, the stay should be lifted. The Bankruptcy Court denied Wilmington's motion and instructed Debtor's counsel to prepare the order.

38. In the course of the hearing, the Bankruptcy Court made some observations that were ambiguous at best as to the position of Coachman Farms. The Chapter 7 Trustee, who did not "exist" at the time of this hearing (Chapter 11 was still operable) later would argue that the Court had "ruled" that Coachman Farms was a part of Debtor's bankruptcy estate. This is false; no such direct language exists. In any event, as a general rule, *res judicata* does not apply to contested matters in bankruptcy proceedings. *See, e.g., D-I Enterprises, Inc. v.*

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[4] See then-judge Gorsuch's masterful opinion *In re Woolsey*, 696 F.3d 1266 (2012) as to how the word "estate" is used in different ways in the Code.

Commercial State Bank, 854 F.2d 35, 39-40 (5th Cir. 1989). Subsection 362(d) of the Code provides that on request of a party in interest and after notice and a hearing, a bankruptcy court may lift the automatic stay. A request for relief-from-stay is always a contested matter governed by Bankruptcy Rule 9014. Relief-from-stay proceedings normally relate to substantive rights and will often implicate underlying substantive disputes, but the mere relationship between the relief motion and the underlying dispute does not confer jurisdiction upon the bankruptcy court to resolve the underlying dispute at that time. The hearing on such a motion is (a) "merely a summary proceeding of limited effect," (b) "not a proceeding for determining the merits of the underlying substantive claims, defenses, or counterclaims," and (c) "merely a grant of permission from the court allowing the creditor to litigate its substantive claims elsewhere without violating the automatic stay." *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 31-35 (1st Cir. 1994; *accord In re Vitreous Steel Prods. Co.*, 922 F.2d 1223, 1231-34 (7th Cir. 1990); *Johnson v. Righetti*, 756 F.2d 738, 740 (7th Cir. 1985).

39. In March of 2020, the Chapter 7 Trustee finally came forward with a proposed settlement of the entire *Morrison* litigation over Debtor's strenuous objections. The settlement was approved by the Bankruptcy Court on July 6/7, and Fetner lost his appeals of same in the District Court and in the Fourth Circuit Court of Appeals.

40. The "Wilmington Settlement" was introduced by the Chapter 7 Trustee in August 2020. The surprise proposal, its acceptance by the Bankruptcy Court, and Debtor's appeals all led to the filing of this Petition for Writ of Certiorari and are argued below.

REASONS TO GRANT THE PETITION

I. The Chapter 7 Trustee Exceeded Its Settlement Authority and Violated Its Fiduciary Duties, Denying Due Process to Debtor and Creating a "Settlement" Outside Legitimate Bankruptcy Purposes.

The procedural mendacity of the Trustee (through counsel) and the eagerness to invent estate assets to ensure trustee compensation – when Debtor's schedules evidenced modest personal assets – led to a settlement scheme of the *Morrison* litigation, at low cost and minimal effort for the Trustee, including the legal claims owned by the Debtor. On appeal of the *Morrison* settlements, a full discussion of which is beyond the available space of this Petition, Debtor exposed the bait-and-switch tactics of the Trustee, who first proposed to the Court a reworking of the *Morrison* complaint for adversary purposes but then suddenly withdrew this strategy, without explanation, for compromises.

The *Morrison* litigation offered a sizeable bounty for serious litigators. The defendants had much to lose, financially and professionally, and should have been decent targets for substantial settlements. No doubt, litigation always has risks and costs, and the outcome of *Morrison* would depend basically on the cooperation of Fetner himself. But the Trustee, taking his cue from the clear bias of the Bankruptcy Court for liquidation of Coachman Farms, constructed a settlement package that in the end depended largely upon a linkage with a sale of Coachman. Wilmington (BoA) was not, however a party to the *Morrison* litigation.

Trustees in concept serve a valuable role in bankruptcy freeing up judges with large dockets to focus on judicial functions. The trustees administer the estate, and judges remain neutral arbiters of disputes in the traditional American adversarial process provided by Congress. In their roles, trustees have a well-recognized fiduciary relationship with the debtor in controlling estate assets for bankruptcy purposes.

Transparency and avoidance of secrecy remain a hallmark of due process, and the opportunity later to challenge a settlement in court, even when the trustee *must* seek approval of a court, is not a sufficient guaranty of curing due process violations. Fair settlement of a dispute by definition requires understanding the claims of each side. Foremost, the Trustee here cannot purport to balance the rights and costs of litigation without thorough discussions with the putative plaintiff. Ongoing discussions are critical once the putative defendant discloses its side. The Trustee, without offering a scintilla of evidence (beyond his testimony), talks in his moving papers of extensive negotiations over six months, involving Debtor and others. With regard to the Debtor at least, this averment is completely false. Debtor was kept entirely in the dark as to any and all negotiations. Debtor on several occasions had simply urged the Trustee to investigate BoA/Wilmington's claim for the purpose of challenging same. The response was always non-committal. Debtor had no idea that a "deal" was in the works.[5]

The Trustee's motion to approve the Wilmington Settlement was based, alternatively, on Code Section 105 and Rule 9019(a), neither of which is a sufficient basis.

A trustee has authority to administer (not "own") a debtor's estate; this authority is limited by the power that Congress has bestowed on bankruptcy courts under the Code. Section 105 authorizes the bankruptcy court to issue any order necessary or appropriate strictly to carry out the provisions of the Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). See also *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014). Thus, courts and trustees may not use §105 to create substantive rights otherwise

[5] The so-called "extensive negotiations" with Wilmington's counsel (the sole representative for Wilmington) occurred in two telephone calls. Six months is a mirage. Additionally, no new (promised) documentation was ever produced by the Trustee, and it may be doubted that the Trustee saw anything that would cure the willful failure by Wilmington to engage in legitimate discovery years earlier in this case. The Trustee does not elaborate on what he "learned" beyond the claim documents on file, which documents can be studied in 30 minutes. As with the *Morrison* settlements, we have seen before Trustee's tactic of hyperbolic descriptions to hide nothing of consequence or relevance.

unavailable under the Code and they may not contravene specific statutory provisions.

The settlement proposed here would not seem to follow any provision of the Code. The Trustee proposed to take a disputed claim by an alleged creditor – a facially non-creditor – out of harm's way by lifting the stay, a lift previously denied, not on the basis of new information or some change of law, but because that action is easier and certainly less expensive to the Trustee. The Trustee above all wishes to avoid (and prevent) legal action by the Debtor. In effect, the Trustee proposes to avoid the necessity of litigating the status of Coachman Farms altogether. Section 105 cannot be said to carry all this weight, to authorize these essentially mental gymnastics of the Trustee.

The use of Rule 9019(a) is equally prohibited. The Rule was never intended as some roving commission to drum up legal business. Not all circuits agree that 9019(a) is even mandatory, but the Fourth Circuit seems to take the position that Rule 9019 is compulsory and contains a procedural and an evidentiary component. Procedurally, the trustee must notify non-settling creditors and the debtor about the proposed settlement. The evidentiary component is related to the court's authority to approve settlements, to inquire if they are fair and equitable and in the best interest of the estate. See generally *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 114 (1968). In other words, 9019(a) applies only to actual creditors and debtors and their deals. Here, we have neither a creditor nor a debtor. Fetner personally borrowed no money from BoA/Wilmington; Wilmington's loan and security was with PJF.

This Court should not be deceived as to the purpose of the Wilmington Settlement, what the Trustee was attempting to accomplish (so far, successfully). In the *Morrison* settlements, the prospective sale of Coachman Farms was the lynchpin of financial return to the alleged creditors and to the Trustee. How then to avoid the bankruptcy stay that had survived two prior lift-of-stay motions? The backdoor: lift the stay as a necessary part of an approved settlement. Never mind that the settlement concerns a claim never made, pure fiction, a non-existent debtor, and a fraudulent creditor, who has spent the entire time in Debtor's bankruptcy obstructing bankruptcy purpose at every turn.

The Trustee now seeks to justify his sleight of hand by the assertions that in a 2013 loan modification with BoA, Debtor was added as a party to the original loan and also that the Bankruptcy Court had previously ruled that Debtor owned Coachman. The truth is considerably different. The Debtor did not borrow any money from BoA in the initial lending, and the deed of trust filed in the Fauquier Courthouse Land Records did not identify Debtor as a borrower. The 2013 modification has never been litigated in these proceedings, and there is no documentary evidence that the modification – the result of a federal program by the Obama Administration to bring financial relief to borrowers who had entered into mortgages inappropriate to the value of the collateral or the ability of the borrower to repay – involved adding borrowers or anything more than forgiving principal and reducing interest. Indeed, the modification documentation nowhere suggests that a new borrower was being added. Nor was the modification ever filed in the Land Records. Moreover, in its second lift-of-stay motion, Wilmington never asserted that Debtor was added as a borrower. Such an assertion would have made a mockery of all the angst displayed concerning PJF status.

Moreover, Petitioner in paragraph 38 of the Statement of the Case has supplied authority for what the Trustee surely knows as a sophisticated bankruptcy attorney: the Bankruptcy Court did not create any *res judicata* at a prior lift-of-stay hearing.

II. At the Hearing Held on October 16, 2020, the Bankruptcy Court Repeatedly Denied Debtor Due Process and Wrongfully Ignored the Code in Approving the Wilmington Settlement.

This entire and constant record of mendacity by the Trustee, evident at the time of his motion and prior to the hearing, was part of the context for Debtor's expedited Sections 305 and 105 combined Motion of October 9 temporarily to suspend all proceedings on a "rolling" two-month basis, with due provision for resumption if required.

Section 305, a little-used provision of the Code, has recently been employed to put Chapter 11 cases on ice because of the Covid-19 crisis, on the one hand, and the parties desire to preserve the underlying case, on the other. The instant motion was premised on two distinct grounds, the Covid-19 ramifications and the temporary unavailability of bankruptcy counsel. Bankruptcy courts may or must abstain from hearing a proceeding arising under the Code or arising in or related to a case under the Code if such abstention is in the interest of justice, or respect for state law. 28 U.S.C. §1334(c). 11 U.S.C. §305 permits abstention from the entire case. In Debtor's Opposition filed the same day, Debtor also suggested that the Court should (or must) abstain from the question of approving the purported "settlement" with Wilmington.

The Covid-19 infections and shutdown made business as usual impossible or too burdensome to consider. The Bankruptcy Court responded by holding relatively routine or simple hearings on "Zoom," a combination of view and audio that allows an interactive meeting of sorts.[6] This Bankruptcy Court in this very matter earlier wisely recognized the impossibility of duplicating a live courtroom experience for evidentiary motions – with all the necessary trappings of due process, efficiency, authority, and understanding – electronically, on Zoom or otherwise. That statement is part of the record in this case. Petitioner wishes to add the well

[6] Petitioner is aware that the Chief Bankruptcy Judge for the Eastern District of Virginia in Standing Order 20-21 dated May 29, 2020 gave approval for temporary protocols to allow remote appearances at required hearings but otherwise recognized the suspension of non-critical in-person proceedings. In that standing order, the Chief Judge also recognized that the courts could convene in-person "when the facts and circumstances of the case necessitate an in-person hearing."

known dictum that an unconstitutional process cannot be used simply because it is convenient or efficient. See *INS v. Chadha*, 462 U.S. 919, 944 (1983).

Debtor had *repeatedly* argued to the Bankruptcy Court that the Trustee's failure to provide full disclosure of his work necessary *before* a proper hearing was a flaw magnified by any artificial Zoom-type experience. In particular, the importance of preparing important substantive arguments on paper, precisely to avoid "discovery" during the hearing and the clumsiness of a *pro se* party in ferreting out the truth of particular contentions.

The record in this case was deficient to hold a hearing of any kind, but the proposed Zoom hearing was a severe denial of Debtor's due process, particularly as a *pro se* litigant. This case had already seen two Zoom hearings, both which were monuments to confusion because of technical glitches. A well-supervised suspension would surely have been in the best interest of creditors and the Debtor.

In arguing for the postponement of this hearing, Debtor also raised the issue of needing to reinsert his bankruptcy counsel into the case. Before the October 16 hearing, Fetner was experiencing difficulty in reaching and communicating with his counsel. There is not sufficient space here to elaborate (or speculate) on why this was so, but the Court had been made aware of the problem previously. Moreover, the Trustee revealed on cross-examination at the October hearing that he had previously urged Debtor's counsel (unknown to

Debtor) to drop out and cease representing Debtor. The Court did not seem shocked by this admission.

Debtor asked for at least two months to attempt to bring his counsel back into action or secure a satisfactory affordable alternative. Under all the circumstances of this case, including the Covid-19 debacle, Debtor was highly prejudiced by this turn of events and needed a suspension to attempt to put things right and regroup. Upon careful examination, Debtor's motion was an intelligent, temporary solution to problems that had arisen and were themselves unforeseen. The Bankruptcy Court brushed the request aside without substantial comment.[7]

When Debtor at the hearing tried to develop the full settlement context of the due process issues, both by direct testimony and by cross-examination of the Trustee, Trustee's counsel objected that the only purpose of the hearing was to ensure that the Trustee had exercised his best business judgment and whether the proposed settlement appeared to be better than the minimum result (for the estate) allowable. The Bankruptcy Court agreed and denied Debtor any chance to develop due process arguments as described herein. Indeed, the Court went so far as to threaten Debtor with contempt if he continued to push his due process objections. As conducted on Zoom, where misunderstandings are common, the entire proceeding could hardly have been more

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[7] Previously, as noted earlier, the Court had allowed the Trustee many months, over a year, initially to put together his settlement proposals.

abusive, a fact or judgment impossible to convey fully from the transcript alone.

Due process is always critical[8] but perhaps even more fundamentally here was the Court's jurisdictional problem. First, the Wilmington settlement was, unlike the *Morrison* settlement, not treated as an adversary matter, as required by the Code. The fatal flaw of the Trustee's Rule 9019 motion – no claim or debtor, as required – carried over. Second, the seminal case of *Stern v. Marshall,* 564 U.S. 462 (2011) does not permit the Bankruptcy Court, a non-Article III court, to enter a final judgment over such a state law claim that was non-core. Properly understood, the §157(b)(2)(B) Code provision as to the claims against an estate did not apply. The Court could not resolve what was in reality an adversary claim outside core bankruptcy power.

In early October 2020, PJF filed in Virginia State court (Fauquier) a multi-count lawsuit against BoA, Wilmington, and Shellpoint (the mortgage loan servicer) claiming, *inter alia,* predatory lending. The

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[8] If all the previously described abuses of due process were not enough, Debtor should emphasize the ultimate catch-22 of the hearing, a carryover from the *Morrison* settlements. The Trustee himself was barely personally involved in any of the settlements. As disclosed at the hearing, the Trustee turned over all duties in this regard to his counsel. When Debtor then attempted to inquire as to Counsel's role, observations, or conclusions, the objection was made to invoke the lawyer-client privilege and prevent any examination of Counsel's role. This abusive tactic was approved by the Bankruptcy Court. Accordingly, Counsel revealed exactly what the Trustee wanted to say and not a word more.

case was filed prior to the October 16 hearing and discussed at the hearing. The Court and the bankruptcy parties well knew of the filing in Virginia. Wilmington later removed the case to Federal District Court in Alexandria. The Trustee and the Bankruptcy Court repeatedly emphasized at the hearing that PJF rights were not affected by the Settlement or Bar Order.

III. The Bar Order Approved Was Overbroad, Beyond Legitimate Bankruptcy Purpose and Unconstitutional.

The Bar Order is only as good as its underlying settlement. Additionally, should the writ for certiorari be granted, Petitioner is prepared to prove, as he did at length at the District Court, that the Order is overbroad, does not meet the various tests that have been developed by the courts narrowly to craft such orders to avoid the sweeping assertions of jurisdiction or relevance found here. Wilmington had no need, nor did it really require, such an "insurance policy" that purported to ice Fetner from its future – a declaratory judgment over any undefined possibility in the future. Wilmington was desperate for a backdoor lift of stay.

Res judicata, whether it be claim or issue preclusion, is well and alive in Virginia, and straying too far afield of *res judicata* or collateral estoppel, as here, also implicates constitutional concerns of First Amendment Freedom of Speech and the Fifth Amendment Taking Clause.

When such a carte blanche legal judgment is so unattached to specific antecedents and the facts of a case and is not reasonably tailored to fit those facts, it runs the risk of trying to end-run the Article III issue of declaratory rulings and impinges directly on rights of free speech. The adversary system is a sort of laboratory for the spirit of open inquiry. Denying the right to assert claims or take appeals is a blow against the search for the truth. No bankruptcy court can impinge upon Debtor's rights in the future to seek assistance in a court to declare and insist upon the benefits of the rule of law despite all the Trustee's verbiage about Debtor's litigious character.

IV. Judge Trenga Violated 28 U.S.C. §455(a) by Denying Debtor's Recusal Motion.

In his Order of April 22, 2021, Judge Trenga dealt briefly with Debtor's recusal motion. He rightly noted that Section 455(a) did not require a finding that a judge is, in fact, partial, only that whether a person would objectively have a reasonable bias for questioning the judge's impartiality. This was Fetner's exact position, but Judge Trenga then goes on to state, quite wrongly as recourse to the motion for recusal would show, that Fetner solely found bias from substantive ruling made by Judge Trenga in the case. The truth is, Petitioner clearly stated that the perception of bias originated in the delay of over a year's time in an obviously expedited appeal for which a timely response was absolutely critical. The failure led to equitable mootness and also encouraged the Bankruptcy Court to continue its forced march to liquidation. Any reasonable person could expect a judge, if given the opportunity, would prefer to justify or minimize the harm previously done by continuing to support the Bankruptcy Court.

In short, the District Court has many competent judges. The concept of "fresh eyes" on appeal might possibly apply in fact to Judge Trenga, but it is not unreasonable to assume that he would be more likely here to choose a defensive posture. Section 455(a) deals with perception and, given the importance of confidence in the courts, leads to recusals when fairly the perceptive could be reasonably negative. Indeed, as argued fully and correctly in Fetner's motion. Judge Trenga would be the last judge imaginable, in Fetner's objective judgment, to hear the appeal.

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. Equally inexplicable is why Judge Trenga became the default choice for the appeals in this bankruptcy following such a disastrous start.

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? Judge Trenga's continued participation makes a mockery of the concept of "fresh eyes."

V. The District Court Failed to Address Debtor's Appeal.

Quite apart from the recusal issue, the District Court basically ignored Debtor's lengthy appeal. The Court set forth a general jurisprudence with respect to approvals pursuant to Rule 9019. The opinion then goes on to state the Bankruptcy Court's conclusion that the settlement reflected a proper exercise of the Trustee's business judgment, that the terms of settlement were fair and reasonable, and that the result was in the best interest of the bankruptcy estate. The Court then states simply that the abuse of discretion standard requires approval of the Bankruptcy Court's conclusions. With one exception, the opinion of the District Court refers to not a single argument by Appellant Fetner: it is entirely a conclusory statement that the Bankruptcy Court did the right thing.

The exception is a remarkable *footnote* on page 5 of the Order which states that in his appeal, Appellant "references issues pertaining to a First Amendment right to free speech, violations of the Taking Clause, 'deprivation of counsel,' and violations of due process based on the Bankruptcy Court's conducting the motions hearing virtually...[but] he has not specifically briefed these issues and it is unclear whether Appellant bases his appeal on any of these grounds." This statement is simply a staggering interpretation of Appellant's designation of issues on appeal and the applicable record and his subsequent 53-page Appellant Brief.

Certainly, the Appellees submitted their own lengthy briefs in opposition and had no trouble finding and responding to Appellant's issues and arguments.

Every single issue raised in this Petition was noted and addressed in the brief submitted to the District Court. A meaningful constitutional right to an appeal demands that issues fairly raised be disposed of. Even if the appellate court finds the arguments baseless, it should say so and why. The discounting of or brushing aside Appellant's best efforts to raise what he believes to be errors of law, including issues of constitutional import, rise in this instance to a severe failure of appellate duty and practice. In the same footnote, the District Court said, "nevertheless, the Court has considered all of the issues raised and finds insufficient support for any of them." With respect, this conclusion, with no support offered whatsoever, is insulting and not worthy of a Federal District Court, even hidden away in a footnote.

VI. The Importance of Supreme Court Review.

With three denials of certiorari to his credit in this bankruptcy litigation, Petitioner cannot stand on the barricades surrounding the Supreme Court and declare with certainty that his writ should be granted.

Petitioner has raised fundamental issues of the role of a bankruptcy court, of trustees, of faithful adherence to the Bankruptcy Code, and no less constitutional due process. No doubt, something is terribly wrong in a courtroom where the judge pronounces in a hearing to determine whether a particular compromise was fair and reasonable in the circumstances presented that the question of due process was irrelevant.

Trial courts and trustees have substantial power given by statute. The bankruptcy system as evidenced herein is broken, not just by difficulty, time, and expense, – but in challenges to the rule of law and due process. As well as to the structure of federalism and the proper complimentary roles of state and federal law. This case is a study as much in the attempt to end-run state law as to subvert bankruptcy purpose.

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 to review de novo this case as the Court has directed. Meantime, any foreclosure of Coachman Farms by Wilmington or its assigns shall be stayed or rescinded, pending such review.

Respectfully Submitted,

/s/

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