No. __-____

IN THE

Supreme Court of the United States

IN RE: JEFFREY J. PROSSER,

Debtor.

NORMAN A. ABOOD; LAWRENCE H. SCHOENBACH and ROBERT F. CRAIG,

Petitioners,

v.

JEFFREY J. PROSSER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 25, 2024

QUESTIONS PRESENTED

This case questions the Third Circuit's appropriation of Congress' exclusive power to create courts under Article III, § 1 of the United States Constitution. Specifically, it challenges the creation by the Third Circuit Judicial council of the Virgin Islands Bankruptcy Court ("VIBC"), a court neither created nor authorized by the U.S. Constitution nor by Congressional enactment.

Petitioners seek review of a Third Circuit decision that, at least two members of the three judge panel below recognized "has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Circuit's decision below also legitimized sanctions imposed by, per the same two concurring Circuit Judges, "an arguably invalid court with no adjudicative authority."

The questions presented are:

1. Whether the Virgin Islands Bankruptcy Court is lawfully constituted under Article III, § 1 of the United States Constitution.

2. Whether this Court's rule of limited statutory interpretation announced in *Nguyen v. United States*, 539 U.S. 69 (2003) overruled the Third Circuit's expansive interpretation announced in *Vickers Assocs., Ltd v. Urice (In re Jaritz Indus.)*, 151 F.3d 93 (3d Cir. 1998).

3. Whether forfeiture of Petitioners' right to challenge the jurisdictional structure of a court on constitutional and/or statutory grounds was contrary to the facts of this case and the law of this Court; and whether the right to challenge the jurisdictional structure of a court can be forfeited.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Norman A. Abood, Esq., Lawrence H. Schoenbach, Esq., and Robert F. Craig, Esq. All three attorneys are counsel for Chapter 7 debtor Jeffrey J Prosser in Virgin Islands Bankruptcy Case no. 3:06-bk-30009.

Respondent is James P. Carroll, Chapter 7 trustee of the estate of Jeffrey J. Prosser in Virgin Islands Bankruptcy Case no. 3:06-bk-30009.

There are no publicly held companies party to these proceedings.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Third Circuit, case no. 22-3456, *In Re: Jeffrey J. Prosser, Jeffrey J. Prosser v. Gerber, et al., Abood; Craig; Schoenbach Appellants,* judgment entered March 22, 2024, *en banc* review denied April 26, 2024.

United States District Court for the Virgin Islands, case no. 3:19-CV-0048, judgment entered March 18, 2022, decision denying reconsideration entered December 13, 2022.

United States District Court for the Virgin Islands, Bankruptcy Division, case no. 06-br-30009, Adv. Proc no. 10-3001, judgment entered June 27, 2019.

U.S. Court of Appeals for the Third Circuit, case no. 14-1633, *In Re: Jeffrey J. Prosser, Jeffrey J. Prosser v. Gerber, et al., James P. Caroll Chapter 7 Trustee Appellant,* judgment entered March 5, 2015, *en banc* review denied February 24, 2015.

United States District Court for the Virgin Islands, case no. 3:11-cv-00136, judgment entered February 14, 2014.

United States District Court for the Virgin Islands, Bankruptcy Division, case no. 06-br-30009, Adv. Proc no. 10-3001, judgments entered August 17, 2010, and December 9, 2011.

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The VIBC's Order determining 28 U.S.C. § 1927 sanctions against Petitioners were appropriate (App. 11) is reprinted in the Appendix ("App.") at App. 99a.

The VIBC's Order determining the amount of the sanction awarded against Petitioners (App. 10) is reprinted at App. 104a.

The VIDC's Opinion and Order vacating the VIBC's sanctions award (App. 8) is reprinted at App. 69a.

The VIBC's Order directing the Trustee to return funds paid by Petitioners (App. 9) is reprinted at App. 94a.

The Third Circuit's "Precedential" Opinion reversing the District Court's order and opinion vacating the VIDCs sanction award (App. 6) is reprinted at App. 48a. the Third Circuit's denial of *en banc* review (App. 7) is reprinted at App. 67a.

The VIBC's Judgment Entry reinstating the sanctions award upon remand (App. 5) is reprinted at App. 44a.

The District Court's Order denial on appeal of the VIBCs Judgment Entry affirming fees (App. 4) is reprinted at App. 38a. the District Court's Order denying reconsideration (App. 3) is reprinted at App. 1a.

The Third Circuit's "Non-Precedential" Opinion affirming the District Court's Order affirming the VIBCs Judgment Entry reinstating the sanctions award and denial of reconsideration (App. 2) is reprinted at App. 20a. the Third Circuit's denial of *en banc* review (App. 1) is reprinted at App. 36a.

STATEMENT OF JURISDICTION

On March 22, 2024, the Third Circuit issued its "Non-Precedential" Opinion affirming the District Court's Order affirming the VIBCs Judgment Entry reinstating a sanctions award against Petitioners and denial of reconsideration. On April 26, 2024, the Third Circuit denied rehearing *en banc*.

The VIDC claimed jurisdiction pursuant to 28 U.S.C. § 158(a); the VIBC claimed jurisdiction pursuant to 28 U.S. Code § 1334(a) and the VIDC's standing order of referral of cases filed under Title 11 of the United States Code to the VIBC.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL, AND STATUTORY PROVISIONS

The dispositive parts of the relevant constitutional and statutory provisions impacting the Virgin Islands federal courts are:

U.S. Const., Article I, Section 8 –
"The Congress shall have the Power …"
Clause 4: "To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"

U.S. Const., Article III, Section 1 – "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. …"

U.S. Const. Article IV, Section 3, Clause 2 – Territory and other Property.
"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

28 U.S.C. § 151 – "In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. …"

28 U.S.C. § 152(a)(1) – "Each bankruptcy judge to be appointed for a judicial district, as provided in paragraph (2) … Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution."

28 U.S.C. § 152(a)(2) – "The bankruptcy judges appointed pursuant to this section shall be appointed

for the several judicial districts as follows: [what follows is a list of the Judicial Districts established by 28 U.S.C. §§ 81-131 and which section mirrors 28 U.S.C. § 133(a) which appoints District Court judges for each Judicial District]." [Note: The Virgin Islands is not listed.]

28 U.S.C. § 152(a)(4) – "The judges of the district courts for the territories shall serve as the bankruptcy judges for such courts. The United States court of appeals for the circuit within which such a territorial district court is located may appoint bankruptcy judges under this chapter for such district if authorized to do so by the Congress of the United States under this section."

[Note: "Congress has empowered the United States Courts of Appeals to appoint bankruptcy judges for unincorporated territories within their circuits, "if authorized to do so by the Congress of the United States." 28 U.S.C. § 152(a)(4). No provision has been made for the appointment of bankruptcy judges for the Virgin Islands.' *St. Croix Hotel Corp. v. Government of Virgin Islands*, 867 F.2d 169, 173, (3d Cir.1989).]

28 U.S.C. § 155 (a) - "A bankruptcy judge may be transferred to serve temporarily as a bankruptcy judge in any judicial district other than the judicial district for which such bankruptcy judge was appointed upon the approval of the judicial council of each of the circuits involved."

28 U.S.C. § 157 (a) – 'Each district court may provide that any or all cases under title 11 and any or all

proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

28 USCS § 158 (a) - "The district courts of the United States shall have jurisdiction to hear appeals[—]
(1) from final judgments, orders, and decrees;
(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
(3) with leave of the court, from other interlocutory orders and decrees;
of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 USCS § 157]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving."

28 U.S.C. § 332 (d)(1) - "Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment.

48 U.S.C. § 1611(a) – "The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress …"

48 U.S.C. § 1612(a) – "The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28 and that of a bankruptcy court of the United States. …."

[Note: Congress expressly accorded bankruptcy jurisdiction to the District Court of the Virgin Islands under the Revised Organic Act. 48 U.S.C. § 1612(a) (Supp. IV 1986). Since the position of bankruptcy judge in the Virgin Islands lapsed in 1986, Pub. L. No. 98-353, § 106(b)(1), 98 Stat. 333, 342 (published at 28 U.S.C. § 152 note), the district judges have performed that function."

…

Unless a bankruptcy judge is appointed for a territory, "the judges of the district courts for the territories shall serve as the bankruptcy judges for such courts." (citing 28 U.S.C. § 152(a)(4)). The District Court of the Virgin Islands, a forum established pursuant to Article IV of the Constitution and enjoying general original jurisdiction over local territorial matters, is not a United States District Court. It is, instead, "more like a state court of general jurisdiction than a United States district court." *Carty v. Beech Aircraft Corp*., 679 F.2d 1051, 1057 (3d Cir. 1982).

St. Croix Hotel Corp., supra, at 173, *15. (Explanation added.)

INTRODUCTION

This case directly challenges the judicial usurpation of Congress' exclusive power to create courts of the United States. It also challenges the Third Circuit's imprimatur allowing the operation of an Article I bankruptcy court in the U.S. Virgin Islands ("VIBC"), to adjudicate cases without the direct supervision and control of an Article III court.

The VI Bankruptcy Court was created by the Third Circuit, not by Congress. Moreover, the Third Circuit has long been aware of the Constitutional impropriety of their action, *i.e.*, the loss of constitutionally mandated protection of citizens' rights – but, to date, has refused to correct its error.

Only this Court can redress this wrong, a wrong that is at the core of this case. This Court is asked to enforce the long-recognized constitutional mandate that an Article I judge can only operate under the direct supervision and control of an Article III court. The Constitution is clear and unambiguous that only Congress has the power to create courts of the United States.

The concurring opinion in the case below refers to the Third Circuit's creation of the VIBC as a "lacuna" in the Congressional statutes. There is, however, no such "lacuna" or gap in the statute. By enacting Title 28 USC § 152 (a)(4)) Congress specifically provided the Virgin Islands with bankruptcy judges. Congress designated the VI

District Court judges as bankruptcy judges. As such, they operate under the direct supervision and control of an Article III court – the Third Circuit Court of Appeals. This action by Congress is constitutionally proper.

However, to avoid having to hear direct appeals of bankruptcy cases and their attendant adversary proceedings, while asserting the necessity to appease the burden on VIDC judges of having to hear bankruptcy cases mandated by Congress, the Third Circuit, not Congress, created the VIBC.

Manpower issues have never been recognized as a basis for allowing a deprivation of constitutional rights. Not only has the Circuit created a court not authorized by Congress, but it also created a court presided over by Article I judges, appointed by designation from the Third Circuit Judicial Council, who operate under the direct supervision and control of Article IV judges – the VIDC judges.

While convenient, this "solution" is an unlawful usurpation of power and destroys the constitutional protection afforded to the citizens of the US Virgin Islands by Article III courts.

STATEMENT OF THE CASE

Petitioners Norman A. Abood, Esq., Lawrence H. Schoenbach, Esq. and Robert F. Craig, Esq., seek Supreme Court review of a Third Circuit decision that sustained severe monetary sanctions imposed on them

by the VI Bankruptcy Court pursuant to 28 U.S.C. § 1927.

On appeal, Petitioners challenged, *inter alia*, the very existence of the VI Bankruptcy Court as an unconstitutional appropriation of Congress' exclusive constitutional power to create courts. *See* U.S. Const. Article. III, § 1. Instead of following the Constitution or Congress, the Third Circuit judicially created the Virgin Islands Bankruptcy Court ("VIBC"). It is neither a court created nor condoned by the U.S. Constitution nor, as recognized by the two-judge concurring opinion, by Congressional enactment. *See* Concurring Opinion of Judge Hardiman, App. 34a-35a.

In sustaining that order on appeal, the Third Circuit acknowledged it was contrary to current Supreme Court law. *See Nguyen v. United States*, 539 U.S. 69, (2003). The issue raised by Petitioners was one of constitutional import and, according to Judge Hardiman's concurring opinion in this case, the Third Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." App. 34a-35a.

Petitioners represent Jeffrey J. Prosser, debtor, in his 2006 Virgin Islands Bankruptcy Court Chapter 7 case. The Prosser bankruptcy case has been extremely protracted, *e.g.*, appeal of the bankruptcy court's denial of Mr. Prosser's discharge has been pending in the Virgin Islands District Court ("VIDC") since 2013.

In 2022, while appealing to the Virgin Islands District Court a VI Bankruptcy Court's sanction order against Petitioners (per 28 U.S.C. § 1924), Petitioners relied on this Court's decision in *Nguyen, supra,* that the VIBC that issued the sanction order was illegally created and thus, its orders void *ab initio.*

Petitioners argued that the specific language of *Nguyen* strictly construed the definitions in 28 U.S.C. § 451[1] to be plain and unambiguous. That strict construction overruled the prevailing Third Circuit precedent in *Vickers Assocs., Ltd v. Urice (In re Jaritz Indus.)*, 151 F.3d 93 (3d Cir. 1998) that held that, as a function of its supervisory power over the Virgin Islands, it was not constrained by the plain language of 28 U.S.C. § 451, and 28 U.S.C. § 155 that omitted the US Virgin Islands in the § 451 statutory scheme.

By redefining the clear legislation of § 451 (that omitted the US Virgin Islands from the statute) – to

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[1] Title 28 USC § 451 defines, in relevant part, "district court" and "district court of the United States" to mean the *courts constituted by Chapter 5 of Title 28*. It also defines the term "judge of the United States" to include judges of the courts of appeals, district courts, Court of International Trade *and any court created by Act of Congress*, the judges of which are entitled to hold office during good behavior. The terms "district" and "judicial district" are defined as *the districts enumerated in Chapter 5 of this title*. Emphasis added.

In identifying those courts and judicial officers to be included in 28 USC § 451, Chapter 5 of Title 28 includes all of the states of the United States, as well as Puerto Rico and the District of Columbia. *It does not include the US Virgin Islands*. Emphasis added.

now include the USVI – the Third Circuit expanded the meaning of the Congressionally enacted bankruptcy statues within the overall context and purpose for establishment of the bankruptcy courts. *See In re Jaritz Indus.*, supra. This was a decision in direct conflict with the Supreme Court rule in *Nguyen*.

In addition to the statutory challenge, Petitioners argued that *Jaritz* directly conflicted with another Supreme Court precedent, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (U.S. 1982). In that case, this Court determined that Congress violated Article III of the Constitution by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication. *See also, Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015) (bankruptcy courts are constitutionally required to be subject to the direct control and supervision of Article III Courts). Among many other concerns, appeals from the VIBC are to the VIDC whose grant of jurisdiction arises under Article IV of the U.S. Constitution and whose judges are Article IV judges, not Article III judges. As such, there is no direct oversight of the Article I VIBC by an Article III Court.

Petitioners challenged the jurisdictional structure, and thus, the very legal existence of the VIBC, under Article III as a constitutional usurpation of Congress' exclusive role to create courts. Relying on *Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446 (2009), Petitioners asserted that VIBC judgments are invalid as a matter of law because any judicial interpretation

of a Congressional statute allowing a violation of Article III, as in *Jaritz*, was unconstitutional.

Also, in upholding the sanctions award against Petitioners the Court below decided that Petitioners forfeited the right to raise the Constitutional challenges because the challenge to the bankruptcy court's very existence was untimely. The Circuit reached this decision, again in direct conflict with Supreme Court precedent, by ignoring this Court's express holding in *Nguyen,* that jurisdictional structural questions grounded in the Constitution are *never* subject to forfeiture by a party. The Circuit created a legal fiction to sidestep the very serious issues raised by Petitioners.

Yet, while joining the majority decision below, the two concurring Circuit Judges (of the three-judge panel) recognized "a strong textual argument that there is no statutory basis for the existence of the V.I. Bankruptcy Court," and that "*Jaritz's* weakness makes it a candidate for overruling." Those two concurring judges called for Congress to avert the "serious problem of judicial administration for the Virgin Islands" … "by amending 28 U.S.C. § 152 to provide a bankruptcy court for the Virgin Islands." By recognizing a need for Congressional action the two concurring judges understood, of necessity, that Petitioners' claims had merit and were on point in identifying the constitutional and statutory violations.

REASONS FOR GRANTING THE WRIT

Unless this Court grants certiorari, the unlawful usurpation of Congressional power and the elimination of the Constitutionally mandated protections of Article III Courts will continue unabated.

The lower court had the opportunity, in fact, the duty, to correct these wrongs. It declined to do so. It has continued to authorize the operation of an invalid court and has continued enforcement, not just of the sanction order at issue in this case, but all orders issued in the Virgin Islands by a court having no legal authority.

It is beyond dispute that only this Court can resolve these issues and stop the ongoing violation of constitutional rights emanating with every decision of the VIBC. It should do so now because it is clear that the VI Bankruptcy Court, the VI District Court, and the Third Circuit has no intention of correcting this clear constitutional violation.

Review is warranted. It is mandated by the obligation to faithfully uphold the Constitution and laws of the United States, an obligation the courts below have conspicuously avoided.

I. THE VIRGIN ISLANDS BANKRUPTCY COURT IS UNLAWFULLY CONSTITUTED UNDER ARTICLE III, § 1 OF THE U.S. CONSTITUTION

The VIBC has never been, and is not currently, lawfully constituted for two separate and independent reasons.

A. Constitutional Grounds:

The VIBC is not an adjunct to an Article III Court. Article III, § 1 of the U.S. Constitution established one federal court: the U.S. Supreme Court.

> Per the Constitution, the federal judicial power vested in the Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish, *id*., and further authorized Congress, in its discretion, to constitute Tribunals inferior to the [S]upreme Court.

U.S. Const. art. I, § 8, cl. 9. *See also*, https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/.

Because the VIBC is not an adjunct to an Article III court, but rather is an adjunct to an Article IV court, the VIBC is not constitutionally authorized to

exercise the judicial power of the United States, *i.e.*, adjudication of the uniform bankruptcy laws.[2]

Wellness[3] held that "[vesting the power to adjudicate the bankruptcy laws of the United States in an Article I judge] does not offend the separation of powers so long as Article III courts retain supervisory authority over the process," *id*., at 678, and "So long as those [Article I] judges are subject to control by the Article III courts, their work poses no threat to the separation of powers" [*Id.*, at 681]. The VIBC is neither supervised nor controlled by an Article III court.[4] It is, therefore, unconstitutional.

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[2] In *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (U.S. 1982) ("*N. Pipeline*") the Supreme Court invalidated the Bankruptcy Act of 1978 holding:

> We conclude that 28 U. S. C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. **Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts**."

Id. at 87 (Bold added).

[3] *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015) ("*Wellness*").

[4] Ironically, there are numerous decisions from the Third Circuit holding that the VIDC is not an Article III Court, and which rely upon the 28 U.S.C. § 451 definitions as authoritative and determinative. This is the same statute and the these are the same definitions rejected as controlling in *Jaritz*.

B. Statutory Grounds:

The legal existence of the VIBC cannot be justified based upon a plain language of the United States Code.

In a case analogues to the case here, this Court was asked in *Nguyen v. United States*, *supra,* to determine the status of the Northern Marianna Islands ("NMI") District Court.[5] Like the District Court of the US Virgin Islands, the NMI District Court was omitted from the list of district courts defined in 28 U.S.C. § 451. This Court found the § 451 definitions "unambiguous" and thus controlling.[6]

Applying § 451, the Court reasoned in *Nguyen* that Title 28, Ch 5, creates "Judicial Districts" and Title 28, Ch 5, creates a "District Court" for each

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[5] *Nguyen* involved Supreme Court review of a criminal appeal heard by the Ninth Circuit in which two of the three panel members were Article III judges, but one judge, the Chief Judge of the District Court of the NMI, was an Article IV territorial-court judge. Despite the fact that neither petitioner in *Nguyen* objected to the composition of the appellate panel hearing their case before the cases were submitted for decision, and neither sought rehearing to challenge the panel's authority to decide their appeals after it affirmed their convictions, this Court granted certiorari. Nguyen's claim, sustained by this court, was that the judgment was invalid because a non-Article III judge participated on the panel.

[6] "The term "district court" as used throughout Title 28 is defined to mean a "'court of the United States'" that is "constituted by chapter five of this title." § 451." *Nguyen*, 539 U.S. at 74. *See fn* 1, *infra.*

Judicial District. *Nguyen*, 539 U.S. at 74-75. *Nguyen* held that "the District Court for the Northern Mariana Islands is not one of the courts constituted by Chapter 5 of Title 28, nor is that court even mentioned within Chapter 5." *Nguyen*, 539 U.S. at 75. In a footnote to the last statement, *fn.* 7, the Court acknowledged that the NMI District Court "is instead established in Chapter 17 of Title 48 ('Territories and Insular Possessions')."

The term "District Court," as used in Title 28, pursuant *Nguyen* does not include District Courts authorized by Title 48 (Territorial District Courts). This alone, when coupled with 28 U.S.C. § 151, plainly establishes that the VIBC was not authorized by statute. *Nguyen* clearly ties the term 'District Court' to the term 'Judicial District' and additionally, both terms are tied to 28 U.S.C.§ 451.[7]

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[7] "Outside of § 292(a), Title 28 contains several particularly instructive provisions. The term "district court" as used throughout Title 28 is defined to mean a "'court of the *United States*'" that is "constituted by chapter five of this title." § 451. Chapter 5 of Title 28 in turn creates a "*United States* District Court" for each judicial district. § 132(a) ("There shall be in each judicial district a district court which shall be a court of record known as the *United States* District Court for the district"). And "district judges" are established as the members of those courts. § 132(b) ("Each district court shall consist of the district judge or judges for the district in regular active service"). The judicial districts constituted by Chapter 5 are then exhaustively enumerated. § 133(a) ("The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows [listing districts]"). Lastly, Chapter 5 describes "district judges" as holding office "during good behavior." § 134(a)." *Nguyen*, 539 U.S. at 74-75.

It is a steadfast rule that Courts do not engage in statutory interpretation unless the statute is ambiguous. *See Sebelius v. Cloer*, 569 U.S. 369, 380 (2013) (Our "inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent). Remarkably, *Jaritz* found no ambiguity. *See* Concurring Opinion of J. Sloviter, 151 F.3d at 103 ("The text at issue before us admits of no ambiguity" and "The majority does not purport to have discovered an ambiguity in any of the statutes relevant to its decision"). In *Jaritz* the Court noted the decision hinged upon courts "that are authorized to exercise the jurisdiction of an Article III court." *Id.*, 151 F.3d at 100. This finding does not apply to Virgin Islands bankruptcy proceedings which are subject of different and a more limited grant of jurisdiction.

Title 48 U.S.C. § 1612(a) vests the VIDC with only the jurisdiction of *a bankruptcy court of the United States*. However, the VIDC does not *exercise the jurisdiction of an Article III court* in Bankruptcy proceedings. Title 28 U.S.C. § 157 was clearly crafted so there would be no impermissible removal of *the essential attributes of the judicial power* from an Article III Court to an Article I Court to comply with the *N. Pipeline* holding. Section 157 does not authorize the Virgin Islands' statutorily designated Bankruptcy Judge[8] to refer bankruptcy proceedings to an inferior

[8] For example, § 152(a)(1) states Bankruptcy Judges shall serve as Judicial Officers of the Article III District Court. Further, § 152(a)(4) plainly state that: "The judges of the district courts for

court, the VIBC, which is ordained with no jurisdiction and purportedly exercises the Article IV Court's derivative jurisdiction.

Nguyen thus held that "[28 U.S.C.] §292(a) cannot be read to permit the designation to the court of appeals of a judge of the District Court for the Northern Mariana Islands." The 9th Circuit Court of Appeals panel was to be comprised of district court judges from within the Ninth Circuit and the Court held that a territorial District Court judge did not fit within the Title 28, Ch. 5 definitions of a District Court judge. *Nguyen*, 539 U.S. at 75.

The VIDC and the NMI District Court are constitutionally indistinguishable. They are both Article IV *territorial* district courts. This Court's decision in *Nguyen* is the precise opposite of the Third Circuit's decision in *Jaritz*.[9] Put succinctly, *Nguyen* eliminates the rational of, and effectively (if not outright) overrules, *Jaritz*.

Like *Jaritz*, *Nguyen* was based on a statutory interpretation and never reached the constitutional constraints regarding the creations of courts. "We find

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the territories shall serve as the bankruptcy judges for such courts."

[9] The *Jaritz* Panel did not find Congress' own statement of the scope of 28 U.S.C. § 451"As used in this title …" binding. On the other hand, *Nguyen* applied the plain language of 28 U.S.C. § 451 to decide that an NMI District Court Judge was not a District Court Judge as the term is used throughout Title 28.

it unnecessary to discuss the constitutional questions because the statutory violation is clear." *Nguyen*, 539 U.S. at 76, n9.

Applying *Nguyen's holding* to the VIDC, the statutory violation is clear. The VIDC was established by Title 48, not Title 28. Further, the VIDC is conspicuously omitted from the list of District Courts found in Title 28, Ch 5. Because of that omission, the VIDC is not, and cannot be, a "District Court" within the meaning of Title 28.

The Supreme Court held "[t]he term 'district court' as used throughout Title 28 is defined to mean a 'court of the United States' that is 'constituted by chapter five of this title.' § 451." *Nguyen,* 539 U.S. at 74 (emphasis added). Therefore, 'district court' as used throughout Title 28 does not include District Courts constituted under Title 48, *e.g.,* the VIDC. As much as circuit courts that oversee territorial jurisdictions would prefer to include those territorial jurisdictions as "district courts" per chapter five of title 451, the law and the constitution do not permit them to do so.

28 U.S.C. § 151, the statutory authorization for bankruptcy courts throughout the judicial districts of the United States, explicitly states that:

> In each judicial district, the bankruptcy judges … shall constitute a unit of the District Court to be known as the bankruptcy court for that district.

Following *Nguyen's* rationale, the VIDC is not and, in fact, cannot be, a District Court. Title 28 U.S.C. § 151 does not authorize the existence of the VIBC. In fact, there is no statute that constitutes legal authorization for VIBC's existence.

The Third Circuit's *Jaritz* decision has been relied upon by the Third Circuit for the past 25 years as authorizing the VI Bankruptcy Court. It ignores *Nguyen* which expressly held that the *term "district court" as used throughout Title 28* means an Article III Court. To allow *Jaritz* to serve as binding precedent for purposes of authorizing the VIBC following the Court's *Nguyen* decision is a disingenuous application of controlling law.[10]

Further, 28 U.S.C. § 158 contemplates appeals from one bankruptcy judge to a panel composed of three bankruptcy judges with the consent of the parties. There is no provision in the U.S. Code, however, that provides for an appeal from an Article I bankruptcy judge's order to a single non-Article III bankruptcy judge.

The 'Statutory Ground' addresses the actual exercise of the constitutional power to create inferior courts which belongs exclusively to Congress. *See*, *e.g.*,

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[10] The Solicitor General concurred with the Supreme Court's interpretation of the Title 28, to wit: "The Solicitor General agrees these statutory provisions are best read together as not permitting the Chief Judge of the Northern Mariana Islands to sit by designation on the Ninth Circuit." *Nguyen*, 539 U.S. at 75.

(i) Overview of Establishment of Article III Courts[11]; and (ii) Overview of Congressional Power to Establish Non-Article III Courts.[12]

II. THE THIRD CIRCUIT IMPLICITLY RECOGNIZED THAT *JARITZ* SHOULD BE OVERRULED

A. This Court's rule of limited statutory interpretation announced in *Nguyen v. United States*, 539 U.S. 69 (2003) overruled the Third Circuit's expansive interpretation announced in *Vickers Assocs., Ltd v. Urice (In re Jaritz Indus.)*, 151 F.3d 93 (3d Cir. 1998)

The controlling law announced in *Nguyen v. United States*, 539 U.S. 69 (2003) that in the absence of ambiguity, statutes, should be read and implemented as written. That simple statement of this Court overruled the Third Circuit's expansive interpretation of statutory construction in *Jaritz*. It was, unfortunately, a decision the Third Circuit declined to recognize. In *Jaritz*, the Third Circuit read 28 U.S.C., Chapters 5 & 6, and 28 USC § 332(d) to include the Virgin Islands in the statute describing "district courts" and "judicial districts." As stated above, nowhere in the enabling legislation does the U.S. Virgin Islands appear. The Third Circuit was

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[11] See https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/.

[12] See https://constitution.congress.gov/browse/essay/artIII-S1-9-1/ALDE_00013604/.

unmoved by Congress. It simply expanded the statutory language to include the USVI.

> While we, of course, recognize that a definitional section like section 451 must presumptively be taken as reflecting the Congressional intent when a defined term is used even in subsequent legislation, it is not controlling where consideration of the term's immediate context and its place in the overall Congressional scheme clearly indicate that it is being used not as a defined term of art but in its commonly understood sense.

Jaritz, at 100.

Remarkably, two members of the three-judge panel of Third Circuit judges in this case recognized the statutory ground for overruling *Jaritz*, separately stating in the concurring opinion: "I write separately to suggest that our Court reconsider *Jaritz* in an appropriate case," App 34a. That concurring opinion citing *Nguyen,* also recognized that "Congress has not established the VIBC." *Id*.

Nevertheless, the concurrence held that "argument is foreclosed by *Jaritz*." App. 35a. Limiting the Third Circuit's admonition strictly to statutory grounds by treating *Jaritz* as binding precedent defies both the plain language of the statutes and the Constitution as clearly stated by this Court in *Nguyen*. The VIBC *ultra vires* operation is being condoned by

the Third Circuit. There is only one Supreme Court and each circuit court is obligated to follow its dictates.

This Court has made clear that "Federal Courts … possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (Citations omitted); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978).

Instead, the Third Circuit condoned the continuing operation of a court which has no enabling statutory foundation and condoned the continuing operation of a constitutionally infirm court.

The Third Circuit's *Jaritz* decision was not made upon sound legal principles but rather as a matter of judicial expediency and convenience. This is certainly true following this Court's *Nguyen* decision. The Third Circuit was bound by intervening Supreme Court law. However, the Circuit's internal operating procedure requires adherence to a third Circuit decision until overruled by the Third Circuit *en banc*. Because Petitioner's *en banc* petition was denied, the Circuit claimed it was bound to adhere to a law it recognized as constitutionally infirm.

Yet, the Third Circuit's internal operating rules must yield to precedential decisions of Supreme Court cases. See *United States v. Henderson*, 64 F.4th 111, 118 (3d Cir. 2023) (a panel may do so when the decision conflicts with later Supreme Court decisions and

subsequent case law applying those decisions.); *Davis v. Samuels*, 962 F.3d 105, 115 (3d Cir. 2020) (that failure to address significant and likely dispositive Supreme Court precedent prompts us to conclude that *Bethea* does not constitute binding precedent); *Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 94 (3d Cir. 2011) (a panel of our Court may decline to follow a prior decision of our Court without the necessity of an *en banc* decision when the prior decision conflicts with a Supreme Court decision); *United States v. Tann*, 577 F.3d 533, 541-542 (3d Cir. 2009) (While we strive to maintain a consistent body of jurisprudence, we also recognize the overriding principle that "[a]s an inferior court in the federal hierarchy, we are, of course, compelled to apply the law announced by the Supreme Court as we find it on the date of our decision."); *Planned Parenthood v. Casey*, 947 F.2d 682, 698-699 (3d Cir. 1991) (In order to change course in a particular area, it simply is unnecessary for the Supreme Court to go case-by-case through fact patterns that the Court had previously addressed under a repudiated standard. If the standard is overruled, decisions reached under the old standard are not binding. We thus conclude that a change in the legal test or standard governing a particular area is a change binding on lower courts that makes results reached under a repudiated legal standard no longer binding.)

It therefore follows that lower courts are bound by the law determined by the Supreme Court. This Court has held:

> More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

Hutto v. Davis, 454 U.S. 370, 374-375 (1982).

There are numerous Third Circuit decisions which cite 28 U.S.C. § 451 for the finding that this Court is not an Article III Court. However, when *Jaritz* and its progeny are implicated, somehow 28 U.S.C. § 451 does not apply. It is arbitrary and capricious. The Third Circuit is usurping the authority assigned by the Constitution to Congress to create inferior courts by condoning the operation of the VIBC. It is wholly improper.

III. FORFEITURE OF PETITIONERS' RIGHT TO CHALLENGE THE JURISDICTIONAL STRUCTURE OF A COURT WAS CONTRARY TO THE FACTS OF THIS CASE AND THE LAW OF THIS COURT

A. Whether the right to challenge the jurisdictional structure of a court on constitutional grounds can be forfeited?

Relying on *Jaritz* the Circuit's decision below found that forfeiture applied[13] against Petitioners claiming that Petitioners waited too long in challenging to the bankruptcy courts' enabling authority. Yet, the concurring opinion of two of the three-judge panel openly questioned extension of the law of forfeiture by *Jaritz* to allow an unlawfully constituted court to exercise any power whatsoever.[14]

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[13] "We agree that the Appellants have forfeited their argument by not raising it earlier, and, finding the Appellants' argument foreclosed by binding precedent, we decline to exercise our discretion to excuse the forfeiture." App.27a.

[14] "The majority faithfully applies *Jaritz*'s holding that the Virgin Islands Bankruptcy Court (VIBC) may impose valid sanctions even if that Court is unlawfully constituted. *See Jaritz*, 151 F.3d at 96-97. In holding as much, *Jaritz* extended the Supreme Court's precedent in *Willy v. Coastal Corp.*, 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992). But I'm not sure that this extension was proper. *Willy* held that "in the circumstances presented [t]here," "a federal district court may impose [Rule 11] sanctions … in a case in which the district court is later determined to be without subject-matter jurisdiction." 503 U.S. at 132. As *Jaritz* conceded, "[t]he authority of the sanctioning judge to sit in his district was not challenged in *Willy*." 151 F.3d at 96.

To reach the "forfeiture" rationale, the Court below re-fashioned Petitioner's argument about the unconstitutionality and statutory illegality of the bankruptcy court itself into a claim akin to an Appointments Clause issue. The Circuit could not have been more wrong.

It was abundantly clear that Petitioners appeal raised a structural challenge to the VIBC's legal existence. That argument was grounded in the U.S. Constitution, the statues of the United States, and the case law of this Court. It was not – and never has been – an Appointments Clause case.

Appointment Clause cases presuppose the improper appointment of a judge to an otherwise valid court. That has never been Petitioner's argument nor are it the facts here. The challenge is not the improper appointment of a judge to an otherwise validly created court – but instead challenges the very invalidity of that court altogether. As Petitioners have always claimed, the VI Bankruptcy court has no adjudicatory authority. It is a Court system that was never legally created, either constitutionally or statutorily.

There was no basis for the panel below to claim that Appointments Clause cases have any relevance to this case. It was simply an expedient legal fiction to

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So *Willy* involved sanctions imposed by an undisputedly valid court with the authority to hear cases. But this appeal involves sanctions imposed by an arguably invalid court with no adjudicative authority." App. 34a – 35a.

avoid sustaining Petitioner's appeal – and thereby having to untangle the bankruptcy court mess the Circuit created when it authorized bankruptcy courts in the Virgin Islands – by judicial fiat and without Congressional enabling legislation.

Nguyen distinguished between a court that was lawfully constituted, and one deemed to never had existed because the Panel was never lawfully constituted. In the former case, case law allows for certain infirmities, while in the latter circumstances the result would require the Courts to subsume power allocated by the Constitution exclusively to Congress[15] to uphold the adjudications.

Waiver and consent with respect to VIBC adjudications are not relevant when an issue is presented involving the legality of a court's lawful creation. The Circuit below had no right to ignore the result of the *Nguyen* holding that when *federal judges or tribunals lack statutory authority to adjudicate the controversy* their adjudications are invalid as a matter of federal law.

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[15] "But to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Nguyen* at 539 U.S. 80. "… we invalidated the judgment of a Court of Appeals without assessing prejudice, even though urged to do so, when the error alleged was the improper composition of that court." *Nguyen* at 539 U.S. 81. "… [[T]his Court has never doubted its power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal." *Nguyen* at 539 U.S. 82. *See* also, *Nguyen* at 539 U.S. 83, n17.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Dated: July 25, 2024

Respectfully 'submitted,

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APPENDIX

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Bankr. No. 3:06-bk-30009

Adv. Pro. 3:10-ap-03001

Civil No. 3:19-cv-0048

In Re:

JEFFREY J. PROSSER,

Debtor,

JAMES P. CARROLL, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF JEFFREY J. PROSSER,

Plaintiff,

v.

TOBY GERBER, et al.

Defendants.

APPEARANCES:

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MEMORANDUM OPINION

MOLLOY, Chief Judge

BEFORE THE COURT is the Motion for Reconsideration, (ECF No. 15)[1], filed by Norman A. Abood, Esq., Lawrence H. Schoenbach, Esq., and Robert F. Craig, Esq. (collectively "Prosser Counsel"). The Bankruptcy Trustee filed a response in opposition to the motion, and Prosser Counsel filed a reply thereto. Prosser Counsel also filed a request for leave to file a supplemental memorandum regarding jurisdiction, as well as a request to reopen case. (ECF No. 24.) This matter is ripe for adjudication. For the reasons set forth below, the Court will deny the motion for reconsideration. The Court having granted Prosser Counsel's motion to file a corrected

[1] Movants also filed identical motions docketed at ECF Nos. 13 and 14. The only differences among the three filings are the attachments at ECF Nos. 13 and 15 and the absence of an attachment at ECF No. 14. The Court finds the earlier motions superseded by the motion docketed at ECF No. 15 and, thus, moot. All references to the "motion" herein are to the Motion for Reconsideration docketed at ECF No. 15.

supplemental memorandum, *see* Order (ECF No. 27), entered November 4, 2022, the motion docketed at ECF No. 24 is moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case is an appeal from a money judgment entered in favor of the Bankruptcy Trustee and against Prosser Counsel rendered in an ancillary proceeding in the underlying bankruptcy matter. The background facts are recited in the Court's Judgment (ECF No. 12), entered March 18, 2022, affirming the Bankruptcy Court's judgment, and will not be reiterated here.

Prosser Counsel now move, pursuant to Rule 7.3 of the Court's Local Rules of Civil Procedure, for reconsideration of this Court's Judgment on the grounds of preventing manifest injustice and the availability of new evidence. Mot. at 2-4. Prosser Counsel also request the Court to take judicial notice of the record of proceedings in three other cases involving the bankruptcy debtor, Jeffrey J. Prosser ("Prosser"). Mot. at 1.

The Bankruptcy Trustee opposes the motion, arguing that the evidence proffered by Prosser Counsel is not new and that no injustice will accrue if the Court does not reconsider its Judgment. *See* Chapter 7 Trustee's Response in Opposition to the Prosser Counsel's Motion for Reconsideration of the Court's Order Dismissing Their Appeal (Opp'n) (ECF No. 18).

Prosser Counsel filed a reply in which they note that in no filings in any of the referenced cases has the Department of Justice denied the existence of the alleged "DOJ/Judge Agreements." *See* Reply (ECF No. 19) at 2. In addition, Prosser Counsel filed a supplemental memorandum wherein they attack the jurisdiction of the Bankruptcy Court of the Virgin Islands, as well as motion to re-open the case based upon their supplemental memorandum. *See* ECF Nos. 26-1 and 24.

II. LEGAL STANDARD

The Court's Local Rules of Civil Procedure provide:

> A party may file a motion asking the Court to reconsider its order or decision. Such motion shall be filed in accordance with LRCi 6.1(b)(3). A motion to reconsider shall be based on: (1) an intervening change in controlling law; (2) the availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice.

LRCi 7.3(a). Under the rule, a motion for reconsideration must be filed within 14 days of entry of the order or decision unless the time is extended for good cause shown. *Id.*; LRCi 6.1(b)(3). Prosser Counsel's motion is timely.

The first rationale a court may employ to reconsider an order or decision listed in the rule, an intervening change in controlling law, is self-

explanatory and not asserted as grounds for the motion, here.

The second basis provided in the rule, the availability of new evidence, has been interpreted to mean newly discovered evidence or evidence that was unavailable at the time the initial order or decision was rendered. *See, e.g., Blystone v. Horn,* 664 F.3d 397, 415-16 (3d Cir. 2011) ("'We have made clear that "new evidence," for reconsideration purposes, does not refer to evidence that a party . . . submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available.' [*Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.,* 602 F.3d 237, 252 (3d Cir. 2010)]. Evidence that is not newly discovered, as so defined, cannot provide the basis for a successful motion for reconsideration." (citing *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985))); *Interfaith Cmty. Org., Inc. v. PPG Indus., Inc.,* 702 F. Supp. 2d 295, 317-18 (D.N.J. 2010) ("[T]he moving party has the burden of demonstrating the evidence was unavailable or unknown at the time of the original hearing." (citing *Desantis v. Alder Shipping Co.,* No. 06-1807 (NLH), 2009 U.S. Dist. LEXIS 13535, at *3 (D.N.J. Feb 20, 2009) (citing *Levinson v. Regal Ware, Inc.,* No. 89-1298, 1989 U.S. Dist. LEXIS 18373, 1989 WL 205724, at *3 (D.N.J. Dec. 1, 1989))).

Regarding the third basis given by the rule, this Court has observed:

> [U] nder the established law, clear error exists if, "'after reviewing the evidence,' [the reviewing court is] 'left with a definite and firm conviction that a mistake has been committed.'" *Norristown Area Sch. Dist. v. F.C.,* 636 F. App'x 857, 861 n.8 (3d Cir. 2016) (quoting *Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1220 (3d Cir. 1993)). In the context of a motion to reconsider, manifest injustice "[g]enerally [ ] means that the Court overlooked some dispositive factual or legal matter that was presented to it." *Greene v. Virgin Islands Water & Power Auth.,* 2012 U.S. Dist. LEXIS 144382, 2012 WL 4755061, at *2 (D.V.I. Oct. 5, 2012) (quoting *In re Rose,* 2007 U.S. Dist. LEXIS 64622, at *3 (D.N.J. Aug. 30, 2007)). "Manifest injustice has also been defined as an 'error in the trial court that is direct, obvious, and observable.'" *Id.* (quoting *Tenn. Prot. & Advocacy, Inc. v. Wells,* 371 F.3d 342, 348 (6th Cir. 2004)).

Simon v. Mullgrav, Civil Action No. 2017-0007, 2021 U.S. Dist. LEXIS 165926, at *6 (D.V.I. Sept. 1, 2021); *see also, e.g., Plaskett v. Cruz,* Case No. 3:17-cv-0067, 2021 U.S. Dist. LEXIS 178563, at *2 (D.V.I. Sept. 20, 2021).

It is well established that motions for reconsideration "are not substitutes for appeals, and are not to be used as 'a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not.'" *United States v. Matthias,* Case No.

3:19-cr-0069, 2022 U.S. Dist. LEXIS 106707, at *7 (D.V.I. June 15, 2022) (quoting *Cabrita Point Dev., Inc. v. Evans,* 52 V.I. 968, 975 (D.V.I. 2009) (quoting *Bostic v. AT&T of the V.I.,* 312 F. Supp. 2d 731, 733, 45 V.I. 553 (D.V.I. 2004))); *see also, e.g., Blystone,* 664 F.3d at 415 (3d Cir. 2011) ("The scope of a motion for reconsideration, we have held, is extremely limited. Such motions are not to be used as an opportunity to relitigate the case . . . ." (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.,* 602 F.3d 237, 251 (3d Cir. 2010))).

III. DISCUSSION

To begin, the Court reiterates that motions for reconsideration "are not to be used as 'a vehicle for . . . raising arguments that could have been raised before but were not.'" *Matthias,* 2022 U.S. Dist. LEXIS 106707, at *7 (citations omitted). The Court also emphasizes, as held by the Third Circuit,

> "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Keene Corp. v. International Fidelity Insurance Co.,* 561 F. Supp. 656, 665 (N.D. Ill. 1983). Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration. *DeLong Corp. v. Raymond International Inc.,* 622 F.2d 1135, 1139-40 (3d Cir. 1980).

Harsco Corp. v. Zlotnicki, 779 F. 2d 906, 909 (3d Cir. 1985) (*cited in Matthias,* 2022 U.S. Dist. LEXIS 106707, at *7).

A. Prevent Manifest Injustice

Prosser Counsel reference several other court proceedings in their motion and request the Court to take judicial notice thereof. Mot. at 1-2. In one of the cases, *Prosser v. Shappert,* 3:21-cv-00026 (D.V.I.), sealed documents in another case, *United States v Williams,* 3:12-cr-00033 (D.V.I.), were at issue, as well as what Prosser Counsel refer to as the "DOJ/Judge Agreements." Prosser Counsel assert that "[a]ffirming the Sanction Order before this Court decides the issues regarding the Motion to Unseal the Williams Case Sealed Records is, respectfully, an abuse of discretion resulting in manifest injustice" and that "[a]ffirming the Sanction Order before this Court decides the issues regarding the DOJ/Judge Agreements is, respectfully, an abuse of discretion resulting in manifest injustice." ECF No. 15 at ¶¶ 12-13.[2] However, the documents sought in those cases do not impact the Judgment entered by this Court in this matter of which Prosser Counsel seek reconsideration. The Judgment clearly sets forth the Court's findings:

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[2] The Court notes that Prosser Counsel refer to the Court's Judgment (ECF No. 12) as affirming the "Sanction Order." However, the Sanction Order already has been appealed and upheld by the Third Circuit. *See* recitation of background facts in Judgment (ECF No. 12) at 1-2. The terms of the Sanction Order, namely the remaining sum of monies due that were awarded to the Bankruptcy Trustee as a sanction against Prosser Counsel, was converted into a judgment, and that judgment forms the basis of this appeal. This proceeding is not and will not be converted into an appeal from nor a relitigation of the Sanction Order.

> Court has plenary authority to review the bankruptcy court's legal rulings but cannot disturb its factual findings unless it committed clear error. *See In re Schick,* 418 F.3d 321, 323 (3d Cir. 2005). Here, the bankruptcy court made no error of law. Fed R. Civ. P. Rule 58(b)(1) provides: "Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when . . . the court awards only costs or a sum certain . . . ." The bankruptcy court was able to reduce the award of costs and fees to $137, 024.02, or, a sum certain. Therefore, judgment was properly awarded, with or without the court's direction. Reviewing the record in this case for plain error, the Court finds no error, let alone plain error. Specifically, the bankruptcy court entered an order to reimburse the estate in the amount of $137,024.02. The order is on the record and was upheld by the Third Circuit. This is the only finding of fact necessary for entry of judgment under Rule 58(b).

Judgment at 3 (citations and footnote omitted). Prosser Counsel fail to support in any way their contention that the documents under seal in the *Williams* criminal case somehow affect the money judgment entered by the Bankruptcy Court. Moreover, as the Court found in *Prosser v. Shappert,* 3:21-cv-00026, in its Memorandum Opinion (ECF No. 32) accompanying its Order granting Defen-

dants' motion to dismiss, Plaintiffs Prosser and Raynor presented no evidence in that case that they are entitled to the unsealing of those sealed documents; likewise, Prosser Counsel have made no showing here that they have a right to access the documents.

Regarding the alleged "DOJ/Judge Agreements," the Court already has found, in the *Shappert* matter, that "nothing in the Complaint alleges plausible facts to support the allegations that such documents even exist." *Prosser v. Shappert,* 3:21-cv-00026, ECF No. 32 at 15. Given that the Declaration of John Raynor that Prosser Counsel attach to their motion for reconsideration largely contains the same allegations, opinions, and conclusions asserted in the *Shappert* Complaint, the Court finds that Prosser Counsel have presented no evidence that the alleged agreements actually exist.

Further, in the context of a motion to reconsider, manifest injustice "'[g]enerally [] means that the Court overlooked some dispositive factual or legal matter that was presented to it.'" *Greene v. Virgin Islands Water & Power Auth.,* 2012 U.S. Dist. LEXIS 144382, at *6 (D.V.I. Oct. 5, 2012) (quoting *In re Rose,* 2007 U.S. Dist. LEXIS 64622, at *3 (D.N.J. Aug. 30, 2007)). Nothing in Prosser Counsel's motion demonstrates that the Court overlooked any dispositive factual or legal matter when it entered the Judgment on March 18, 2022. As stated in the Judgment, the Court found no error with entry of the Bankruptcy Court's judgment. ECF No. 12 at 3.

B. New Evidence

Most of the allegations contained in the declaration provided by Prosser Counsel do not constitute newly discovered evidence. "It is well-settled that a motion for reconsideration cannot be used to introduce for the first time evidence that was previously available, thus giving the party seeking to present such evidence a second bite at the apple." *Greene,* 2012 U.S. Dist. LEXIS 144382, at *5 (citations omitted). As stated in the Declaration of John Raynor, ECF No. 15-1 at 5-6, ¶¶ 22-23, the alleged "DOJ/Judge Agreements" first were brought to a court's attention by Mr. Raynor in 2018, prior to the filing of the appeal herein. Thus, despite the fact that Mr. Raynor's declaration attached to Prosser Counsel's motion for reconsideration currently before the Court is dated March 25, 2022, the primary contents thereof were known and available to Prosser Counsel before the Court entered Judgment herein on March 18, 2022. Consequently, this declaration does not constitute new evidence for the purposes of a motion for reconsideration.

Further, courts in this judicial circuit have required not only that the evidence be "new," but also that it is of such importance that it "alter the disposition of the case." *Interfaith Cmty. Org.,* 702 F. Supp. 2d at 317 ("To permit reconsideration when new evidence becomes available, the moving party must present new evidence that would alter the disposition of the case." (citing *Church & Dwight Co. v. Abbott Labs.,* 545 F. Supp. 2d 447,

450 (D.N.J. 2008))). Thus, even if the declaration could be considered new evidence, its production does not affect the Court's Judgment and, therefore, does not provide a valid basis for reconsideration. First, the Court found that the "bankruptcy court made no error of law." Judgment (ECF No. 12) at 3. Second, as the Court states in the Judgment, "By failing to abide by the Court's scheduling order and file a brief, or any legal argument whatsoever in the more than two years that this appeal has been pending, the Court finds that Prosser Counsel has failed to raise any substantial question in their appeal." *Id.* Prosser Counsel do not present any evidence, new or otherwise, in their motion for reconsideration that affects such finding.

C. Jurisdiction of the Bankruptcy Court

In a last-ditch effort to upend the Bankruptcy Court's money judgment against them, Prosser Counsel posit that "there is no statutory/legislative basis for [Virgin Islands Bankruptcy Court] VIBC." ECF No. 26-1 at 4. Their argument, in a nutshell, is: 1) only Judicial Districts and Article III courts are empowered to create bankruptcy courts under 28 U.S.C. § 151;[3] 2) the District Court of the Virgin

[3] Section 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred

Islands is not a Judicial District or an Article III court; 3.) therefore, the Virgin Islands Bankruptcy Court is not a properly organized court, with no jurisdiction or authority to adjudicate bankruptcy matters or issue valid orders in the place of the Virgin Islands District Court. *See* ECF No. 26-1 *passim*.

Notwithstanding Prosser Counsel's position to the contrary, the Third Circuit Court of Appeals already has ruled on this issue in *Vickers Assocs., Ltd v. Urice (In re Jaritz Indus.),* 151 F.3d 93 (3d Cir. 1998). As noted by this Court,

> [t]he Third Circuit in *In re Jaritz* concluded that the temporary assignment of bankruptcy judges to the Virgin Islands was authorized under two statutes; that the fact that the District Court of the Virgin Islands is an Article IV rather than an Article III court did not make a difference in authorizing the temporary transfer; and that the Bankruptcy Court had jurisdiction to enter orders.

In re Watson, Civil Nos. 3:2011-0012 and 3:2011-0058, 2016 U.S. Dist. LEXIS 77684, at *40 and n.19 (D.V.I. June 15, 2016).

Further, the Court disagrees with Prosser Counsel that *Jaritz* is no longer good caselaw in the

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> under this chapter [28 USCS §§ 151 et seq.] with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151.

wake of the United States Supreme Court's opinion in *Nguyen v. United States,* 539 U.S. 69 (2003). In *Jaritz,* the court of appeals interpreted judicial district to include the Virgin Islands for purposes of 28 U.S.C. § 155[4] (*Jartiz,* 151 F.3d at 97); whereas, the *Nguyen* Court was addressing the meaning of "district judge" within the context of 28 U.S.C. § 292(a), noting the difference between a judge appointed to an Article III United States District Court and an Article IV court for the purposes of designating a "district judge" to serve on the courts of appeal. *Nguyen,* 539 U.S. at 74. The issue in *Nguyen* was the assignment of a judge from the District Court for the Northern Mariana Islands to sit on a panel of the Ninth Circuit Court of Appeals. The Supreme Court found this assignment to be improper and, consequently, deemed the decisions in the cases which he heard and participated invalid. *Id.* at 74, 76, 80-83. At the outset, the *Nguyen* Court states:

> We begin with the congressional grant of authority permitting, in certain circumstances, the designation of district judges to serve on the courts of appeals. In relevant part, the designation statute authorizes the chief judge of a

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[4] Section 155 provides, in pertinent part:

> A bankruptcy judge may be transferred to serve temporarily as a bankruptcy judge in any judicial district other than the judicial district for which such bankruptcy judge was appointed upon the approval of the judicial council of each of the circuits involved.

28 U.S.C. § 155(a).

> circuit to assign "one or more district judges within the circuit" to sit on the court of appeals "whenever the business of that court so requires." 28 U.S.C. § 292(a) [28 USCS § 292(a)]. Section 292(a) itself does not explicitly define the "district judges" who may be assigned to the court of appeals. However, as other provisions of law make perfectly clear, judges of the District Court for the Northern Mariana Islands are not "district judges" within the meaning of § 292(a).

Nguyen, 539 U.S. at 74. The ruling, applied to this small set of facts, is a very narrow one and should, therefore, be narrowly applied.

In contrast, the *Jaritz* court approached the issue of Judge Cosetti's assignment to adjudicate bankruptcy matters in the Virgin Islands with the overall context and purpose for the establishment of bankruptcy courts in general in mind.

> We find nothing in the text of section 155 that limits its scope to judicial districts having an Article III district court. Similarly, we find nothing in the text of Chapter 6 that, as a matter of textual analysis, so limits the scope of that section. Finally, we find nothing in the very sparse legislative history of the 1984 Act that suggests an intent to restrict the authorization conferred by section 155 to Article III districts. Thus, consideration of the text and legislative history of Chapter 6 alone would tend to support the view that "judicial district" was intended to include any district in which

> judicial authority over bankruptcy matters is exercised.

In re Jaritz Indus., 151 F.3d at 97-98.[5] The court then considers the overall objective of Chapter 6 of Title 28 of the United States Code and continues:

> Having identified the evident purpose of section 155, we turn to the overall statutory scheme of Chapter 6 to determine if there is any reason Congress might have wished to garner the efficiencies provided by that section for judicial districts having an Article III district court and not for judicial districts having an Article I district court which exercises the jurisdiction of an Article III court by virtue of the legislation that created it. We perceive no such reason. To the contrary, our review of the statutory scheme has convinced us that Congress intended the new bankruptcy system to operate in the Virgin Islands in the same manner it was to operate in an Article III district under comparable circumstances.

Id. at 98. Given these findings, the court concludes:

> Based on our review of Chapter 6 of Title 28, the following relevant propositions seem to us

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[5] As the *Watson* court notes, in *Alkon v. United States,* 239 F.3d 565, 43 V.I. 325 (3d Cir. 2001), the "Third Circuit fully adopted the statutory analysis in *In re Jaritz* when analyzing the meaning of the term 'district court' in § 155, and applied that definition to another statute concerning the District Court of the Virgin Islands." *In re Watson,* 2016 U.S. Dist. LEXIS 77684, at *40 n.19.

> indisputable: (1) Congress intended bankruptcy matters to be adjudicated in the District Court of the Virgin Islands; (2) Congress determined that bankruptcy judges would assist the judges of that district when there was a sufficient workload to warrant a full-time bankruptcy judge, and the bankruptcy system would thereafter function in that district in the same manner as in Article III districts; and (3) Congress intended the Judicial Council of the Third Circuit to make the most effective and efficient use of district judge and bankruptcy judge power in the circuit by temporarily transferring bankruptcy judges so as to match the need for bankruptcy services in a district with the judge power available there. The remaining issue is whether Congress intended to foreclose the Judicial Council of the Third Circuit from acting to meet an unserved need for bankruptcy services in the Virgin Islands by temporary transfer prior to the time when the bankruptcy workload is of sufficient size and consistency to warrant the creation of a full-time bankruptcy judge seat for the District Court of the Virgin Islands. Having considered this issue, we now make explicit what we believe is implicit in our decision in *Kool, Mann*: We conclude that the 1984 Act evidences no Congressional intent arbitrarily to defer the flexibility and thus the efficiency provided by section 155 in this manner.

Id. at 99.

Moreover, the *Jaritz* court acknowledges the definition of "district court" provided in Section 451 of Title 28,[6] but notes that the

> [d]efinitions of section 451 were codified 36 years before the adoption of the 1984 Act, . . . and are definitions for general application throughout all 53 chapters of Title 28. While we, of course, recognize that a definitional section like section 451 must presumptively be taken as reflecting the Congressional intent when a defined term is used even in subsequent legislation, it is not controlling where consideration of the term's immediate context and its place in the overall Congressional scheme clearly indicate that it is being used not as a defined term of art but in its commonly understood sense.

In re Jaritz Indus., 151 F.3d at100.

Based upon the foregoing and in the absence of any authority to the contrary, the Court finds that the Third Circuit's holding in *Jaritz* remains controlling and, consequently, that Prosser Counsel's argument must fail.

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[6] While the *Nguyen* Court does reference and take guidance from that definition, 539 U.S. at 74, that provision is not the only factor the Supreme Court considers. The *Nguyen* Court also looks to other sections within Chapter 5 of Title 28, the chapter titled "District Courts," as well as the fact that "judges of the District Court for the Northern Mariana Islands are appointed for a term of years and may be removed by the President for cause" and, thus, "do not satisfy the command for district judges within the meaning of Title 28 to hold office during good behavior. § 134(a)." *Nguyen,* 539 U.S. at 75.

IV. CONCLUSION

Because the Court finds that Prosser Counsel have failed to demonstrate a basis for reconsideration, reconsideration is not warranted, and the Court will deny the motion. In view of the Court's granting the request to file a corrected supplemental memorandum docketed at ECF No. 26, the similar request docketed at ECF No. 24 is moot. An appropriate Order follows.

Dated: December 13, 2022 */s/ Robert A. Molloy*
ROBERT A. MOLLOY
Chief Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3456

IN RE: JEFFREY J. PROSSER,

Debtor

JEFFREY J. PROSSER

v.

TOBY GERBER; FULBRIGHT & JAWORSKI, LLP;
RURAL TELEPHONE FINANCE COOPERATIVE;
DANIEL C. STEWART; JAMES J. LEE;
RICHARD LONDON; DUSTIN MCFAUL;
VINSON & ELKINS, LLP; STAN SPRINGEL;
JAMES P. CARROLL; FOX ROTHSCHILD, LLP;
GENOVESE, JOBLOVE & BATTISTA, P.A.;
PAUL BATTISTA; THERESA VAN VLIET;
ALVAREZ & MARSAL, LLC

NORMAN A. ABOOD; ROBERT F. CRAIG;
AND LAWRENCE H. SCHOENBACH,

Appellants

On Appeal from the District Court
for the Virgin Islands
(District Court No. 3-19-cv-00048)
District Judge: Honorable Robert A. Molloy

Argued December 12, 2023

(Filed: March 22, 2024)

Before: HARDIMAN, KRAUSE, RENDELL,
Circuit Judges.

OPINION*

Norman A. Abood [ARGUED]
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Counsel for Appellants Norman A. Abood and Lawrence H. Schoenbach

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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Counsel for Appellee James P. Carroll, Chapter 7 Trustee

RENDELL, *Circuit Judge*.

This appeal stems from a sanctions award entered against appellants Lawrence Schoenbach, Robert Craig, and Norman Abood (collectively, the "Appellants") by a bankruptcy judge temporarily assigned to the Virgin Islands Bankruptcy Division (the "Bankruptcy Court") pursuant to 28 U.S.C. § 155. Following an appeal to this Court, the sanctions award against them was reduced to judgment, and the District Court of the Virgin Islands summarily affirmed the judgment and denied the Appellants' motion for reconsideration. Schoenbach, Craig, and Abood appeal to this Court, urging, for the first time, that the Bankruptcy Court and the bankruptcy judge lacked the authority to enter the sanctions order against them.

We conclude that the issue raised by the Appellants is too little, too late, and we will affirm the District Court.

I[1]

Section 155 of Title 28 of the United States Code provides that "[a] bankruptcy judge may be transferred to serve temporarily as a bankruptcy judge in any judicial district other than the judicial district for which such bankruptcy judge was appointed upon the approval of the judicial council of each of the circuits involved." 28 U.S.C. § 155(a). Pursuant to § 155, the Judicial Council of the Third Circuit designated the Honorable Judith K. Fitzgerald to preside over bankruptcy cases in the Virgin Islands Bankruptcy Division.

In 2006, Jeffrey Prosser filed a Chapter 11 bankruptcy petition in the Virgin Islands Bankruptcy Division. Attorneys Lawrence Schoenbach, Robert Craig, and Norman Abood represented Prosser, and his petition was converted into a Chapter 7 petition. James Carroll was appointed trustee of Prosser's estate.

In January 2010, the Appellants moved for an evidentiary hearing on what they alleged was a witness bribery scheme furthered by Carroll's counsel. In quick succession, the Appellants filed an adversary complaint in the Bankruptcy Court against Carroll and his counsel, objections to Carroll's

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[1] Because we write only for the parties, we will recite only the facts necessary to our decision.

quarterly applications for compensation and reimbursement of expenses, and a motion for a hearing on an alleged conflict of interest between Carroll and his counsel. In March 2010, the Bankruptcy Court denied the motion for an evidentiary hearing as against Carroll's counsel and likewise denied the conflict motion. Shortly thereafter, the Appellants voluntarily dismissed the claims in the motion for an evidentiary hearing as against Carroll and withdrew their fee objections.

In April 2010, Carroll filed a motion under 28 U.S.C. § 1927 for fees and costs incurred by the estate due to the Appellants' January filings. Bankruptcy Judge Fitzgerald found that the Appellants had "unreasonably and vexatiously multiplied proceedings in bad faith" and awarded Carroll $137,024.02 (the "Sanctions Order"). App. 13.

The Appellants failed to pay the sum in full. When Carroll filed a notice of default in January 2014, the Appellants appealed the Sanctions Order to the District Court of the Virgin Islands. In February 2014, the District Court vacated the Sanctions Order and remanded to the Bankruptcy Court. *See In re Prosser*, No. 11-cv-136, 2014 WL 585346, at *7–9 (D.V.I. Feb. 14, 2014). The Bankruptcy Court then ordered that Carroll return what payments he had received under the Sanctions Order.

Carroll appealed the District Court's order. In January 2015, a panel of this Court reversed the District Court's order and remanded with instructions that the District Court reinstate the Sanc-

tions Order. *See In re Prosser*, 777 F.3d 154, 163 (3d Cir. 2015).

After the reinstatement of the Sanctions Order, the Appellants still failed to make further payment. So, in June 2019, the Bankruptcy Court reduced the fee award to judgment under Federal Rule of Civil Procedure 58(b).

In July 2019, the Appellants appealed that ruling to the District Court. However, they failed to ever file a brief consistent with the District Court's scheduling order. Because of that failure, in March 2022, the District Court summarily affirmed the Bankruptcy Court's judgment, noting that the Sanctions Order was "on the record and was upheld by the Third Circuit." App. 15.

The Appellants filed a motion for reconsideration in March 2022. In October 2022, the Appellants filed a supplemental memorandum in support of their motion for reconsideration, arguing, for the first time in the course of this litigation, that the United States Bankruptcy Court of the Virgin Islands is not "legally constituted," such that the Sanctions Order was void *ab initio*, because our Judicial Council lacked statutory authority to transfer bankruptcy judges to sit in the Virgin Islands District Court, an Article IV territorial court. App. 128. The District Court denied the motion. Evaluating the Appellants' argument as "a last-ditch effort to upend the Bankruptcy Court's money judgment," App. 23, the District Court concluded that the Bankruptcy Court in the Virgin Islands had jurisdiction and authority to adjudicate bankruptcy proceedings and issue valid orders

under our opinion in *Vickers Assocs., Ltd. v. Urice (In re Jaritz Industries, Ltd.)*, 151 F.3d 93 (3d Cir. 1998).

The Appellants timely appealed to this Court.

II[2]

The Appellants argue that the Bankruptcy Court lacks constitutional and statutory authorization to adjudicate bankruptcy proceedings in the Virgin Islands, and thus its orders, including the Sanctions Order affecting the Appellants, are void *ab initio*. Carroll counters with several arguments including, *inter alia*, that the Appellants failed to timely raise the issue of whether the Bankruptcy Court lacked authority and thus forfeited that argument,[3] and regardless of whether the Bank-

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[2] The District Court referred this matter to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and asserted jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1). We have jurisdiction under 28 U.S.C. §§ 158(d)(1), 1291, and 1294(3).

We review a district court's denial of a motion for reconsideration for abuse of discretion. *Gibson v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 182, 186 (3d Cir. 2021). However, we exercise *de novo* review to the extent the denial is based on legal issues. *Id*. We may affirm the decision below on any ground supported by the record. *TD Bank N.A. v. Hill*, 928 F.3d 259, 270 (3d Cir. 2019).

[3] Forfeiture is "the failure to make the timely assertion of a right," while waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Although Carroll refers to the Appellants' failure to timely raise their Article III structural and statutory arguments as "waiver," in an effort to be precise, we

ruptcy Court's authority suffered from some defect, it had jurisdiction to impose the Sanctions Order. We agree that the Appellants have forfeited their argument by not raising it earlier, and, finding the Appellants' argument foreclosed by binding precedent, we decline to exercise our discretion to excuse the forfeiture.

A

We first address whether the Appellants' claim was forfeitable. "No procedural principle is more familiar . . . than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). The Appellants' challenge is effectively a challenge to the validity of the transfer of a bankruptcy judge to sit in the Bankruptcy Division of the Virgin Islands District Court. The Supreme Court has categorized Appointment Clause challenges to the authority of a judicial officers to preside over cases before them as "nonjurisdictional structural constitutional objections." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878–79 (1991) (concluding that Appointments Clause challenge to the authority of a special trial judge in the Tax Court fit within the "nonjurisdictional structural constitutional objections" category); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d

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will refer to the same failure as "forfeiture" throughout this opinion.

748, 755–56 (D.C. Cir. 2009) (determining appellants had forfeited nonjurisdictional constitutional challenge to the validity of the appointment of Copyright Royalty Judges by the Library of Congress). Although this appeal does not involve an Appointments Clause challenge, the Appellants do raise a structural constitutional claim questioning which branch of government may transfer judicial officers to an Article IV territorial court. Finding caselaw on Appointments Clause challenges to be analogous and persuasive, we conclude that the Appellants raise a nonjurisdictional structural objection here, and it follows that their objection was forfeitable. *See Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 251 (2018) (specifying that "'one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief" (emphasis added) (quoting *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)).

We have discretion to consider such claims where they have not been timely raised below. *Freytag*, 501 U.S. at 878. In *Freytag*, the petitioners argued that the assignment of their complex case to a special trial judge in the Tax Court was not statutorily authorized, thus violating the Appointments Clause. *Id.* at 872. Although the *Freytag* petitioners only raised this argument on appeal, the Supreme Court agreed to take up the challenge on the merits because they considered the argument "neither frivolous nor disingenuous." *Id.* at 879. Nevertheless, the Court noted that it would exer-

cise its discretion to hear such forfeited arguments only in "rare cases." *Id.*

This is not the type of rare case that would warrant an exercise of our discretion because it is essentially disingenuous. The Appellants offer no reasonable justification for raising their structural constitutional and statutory arguments twelve years after the Bankruptcy Court entered the Sanctions Order, seven years after this Court upheld the validity of the sanctions, three years after the Bankruptcy Court reduced the sanctions to judgment, and six months after the Appellants had filed a motion for reconsideration in the District Court. At oral argument, by way of explanation for this extraordinary delay, Mr. Abood conceded only that he had "never, in [his] career of 40 years, . . . had to look at the issue of the structural integrity of the way the courts are composed." Oral Arg. Recording at 3:35–43. The Supreme Court case, *Nguyen v. United States*, 539 U.S. 69 (2003), that the Appellants rely upon and argue implicitly overrules our directly relevant precedent, *In re Jaritz*, 151 F.3d 93, is not recent; *Nguyen* was decided over twenty years ago, several years before the bankruptcy petition underlying this appeal was even filed. Because the Appellants failed to exercise appropriate diligence, they lost countless opportunities to raise their constitutional and statutory arguments before the courts below. The remarkable timeline of this appeal does little to assuage concerns that the Appellants have been engaged in a disingenuous "practice of 'sandbagging': suggesting or permitting, for strategic rea-

sons, that the [lower] court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment). As is obvious, for over twelve years, they have had the use of the funds that should have been paid pursuant to the various orders against them.

The Appellants urge that we should excuse their lack of timeliness, looking primarily to *Nguyen*. In *Nguyen*, the Supreme Court considered whether a Ninth Circuit panel consisting of two Article III judges and one Article IV judge had the authority to decide the petitioners' appeals, notwithstanding the petitioners' failure to object to the panel's composition in the Court of Appeals. 539 U.S. at 74–77. But there, the Supreme Court exercised its discretion to consider the forfeited issue under its Rule 10(a) supervisory power. *Id.* at 73–74. The *Nguyen* majority considered the statutory violation at issue to "embod[y] a strong policy concerning the proper administration of judicial business," *id.* at 78 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion of Harlan, J.)), noting particularly that an improperly constituted *panel* of Article III judges raised appellate jurisdictional concerns. *Id.* at 83 n.17. As we have explained, we view the Appellants' constitutional structural claim here as nonjurisdictional, and as we will explain further below, no other rationale motivates us to excuse the Appellants' tardiness.

B

The Appellants' argument is also frivolous because, even assuming *arguendo* that the Bankruptcy Court lacked authorization to adjudicate the Prosser bankruptcy proceedings on the merits, it is clear that the Bankruptcy Court would still have had the power to impose sanctions on the Appellants as attorneys appearing before it under *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), as interpreted by our decision in *Jaritz*, 51 F.3d at 96–97.

Judge Fitzgerald imposed sanctions on the Appellants under § 1927, which provides that

> [a]ny attorney . . . admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The Supreme Court has held that even where a district court lacks subject matter jurisdiction over the merits of a case, it retains jurisdiction to impose sanctions on attorneys. *See Willy*, 503 U.S. at 137 ("[A] determination [that a court lacks subject matter jurisdiction] does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction."). The *Willy* Court reasoned that "the maintenance of orderly procedure, even in the wake of a jurisdiction ruling later found to be mis-

taken . . . justifie[d] the conclusion that [a] sanction ordered . . . need not be upset." *Id.* Having sanctions orders stand in such circumstances does not raise any "constitutional infirmity under Article III in requiring those practicing before the courts to conduct themselves in compliance with the applicable procedural rules in the interim." *Id.* at 139.

In *Jaritz*, we applied the rationale in *Willy* to facts like those before us now.[4] *See In re Jaritz*, 151 F.3d at 96–97. Here, just as in *Jaritz*, the Appellants do not deny that the bankruptcy judge imposing sanctions was "a duly appointed judge with the authority to exercise the judicial power of the United States in bankruptcy matters," at least in her own district. *Id.* at 97. Judge Fitzgerald, Carroll, and the Appellants' client, Prosser, each "had a substantial interest in the proceedings being conducted in an orderly manner," an interest that did not retroactively fade away the moment the Appellants questioned the Bankruptcy Court's authority

[4] We note that *Willy* involved Rule 11 sanctions, *Willy*, 503 U.S. at 137, and *Jaritz* involved parallel sanctions under Federal Rule of Bankruptcy Procedure 9011. *In re Jaritz*, 151 F.3d at 96. The Bankruptcy Court here imposed sanctions under 28 U.S.C. § 1927, but we see no reason to draw a distinction on that basis. That is because § 1927 sanctions similarly do not require a determination on the merits of the case and are imposed to curb "unreasonabl[e] and vexatious[ ]" litigant behavior to maintain orderly procedure within the courts. 28 U.S.C. § 1927; *see also Hyde v. Irish*, 962 F.3d 1306, 1310 (11th Cir. 2020) (holding that a district court may address § 1927 motions notwithstanding a lack of jurisdiction over the underlying case).

to hear the underlying merits of the case. *Id.* As officers of the court, the Appellants had a duty to comport themselves appropriately before the Bankruptcy Court "unless and until it is finally determined that the apparent authority of [the bankruptcy judge] is invalid." *Id.* Under *Jaritz*, we perceive no constitutional concern arising from a decision to let the sanctions against the Appellants stand, particularly given our interest in maintaining order in the courts below.

In short, we need not weigh in on the authority of the Bankruptcy Court to hear the merits of the underlying Prosser bankruptcy litigation because this appeal centers upon the Sanctions Order, which is not only collateral to the merits of the case, but has since been reduced to judgment. *See In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d 152, 156–57 (3d Cir. 1997) (recognizing "abundant authority permitting the imposition of sanctions in the absence of jurisdiction over a case" to the extent such sanctions do not terminate a case on the merits). The Appellants' complete failure to confront the effects of the primary holding in *Jaritz* on their argument militates further against our exercise of discretion to consider their forfeited argument.

IV

For the foregoing reasons, we will affirm the judgment of the District Court and the order of the District Court denying the Appellants' motion for reconsideration.

* * *

HARDIMAN, *Circuit Judge*, concurring, with whom KRAUSE, *Circuit Judge*, joins.

I agree with my colleagues that we should not excuse Appellants' forfeiture and that *In re Jaritz Industries, Ltd.*, 151 F.3d 93 (3d Cir. 1998), requires us to affirm the sanctions order. I write separately to suggest that our Court reconsider *Jaritz* in an appropriate case. Given the consequences that would follow from reconsidering *Jaritz*, I also suggest that Congress consider filling a lacuna in the statutory scheme governing bankruptcy courts.

The majority faithfully applies *Jaritz*'s holding that the Virgin Islands Bankruptcy Court (VIBC) may impose valid sanctions even if that Court is unlawfully constituted. *See Jaritz*, 151 F.3d at 96–97. In holding as much, *Jaritz* extended the Supreme Court's precedent in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). But I'm not sure that this extension was proper. *Willy* held that "in the circumstances presented [t]here," "a federal district court may impose [Rule 11] sanctions . . . in a case in which the district court is later determined to be without subject-matter jurisdiction." 503 U.S. at 132. As *Jaritz* conceded, "[t]he authority of the sanctioning judge to sit in his district was not challenged in *Willy*." 151 F.3d at 96. So *Willy* involved sanctions imposed by an undisputedly valid court with the authority to hear cases. But this appeal

involves sanctions imposed by an arguably invalid court with no adjudicative authority.

I perceive a strong textual argument that there is no statutory basis for the existence of the VIBC. The provisions that authorize bankruptcy courts in the federal judicial districts, 28 U.S.C. § 151 *et seq.*, use the terms "judicial district" and "district court" as those terms are defined by 28 U.S.C. § 451. Yet Congress's definition of "judicial district" does not include the Virgin Islands, and its definition of "district court" does not include the Virgin Islands District Court. *See* 28 U.S.C. § 451. So Congress has not established the VIBC. *See Nguyen v. United States*, 539 U.S. 69, 74–76 (2003). But that argument is foreclosed by *Jaritz*, which atextually declined to apply the § 451 definitions and held that the VIBC was lawfully constituted. *See* 151 F.3d at 100–01.

Although *Jaritz*'s weakness makes it a candidate for overruling, the gap in 28 U.S.C. § 151 *et seq.* presents a serious problem of judicial administration for the Virgin Islands. If we hold that Congress has not authorized a bankruptcy court for the Virgin Islands, the VIBC's caseload will fall to the already oversubscribed Virgin Islands District Court. *See* 28 U.S.C. § 152(a)(4). Congress can avert this potential problem by amending 28 U.S.C. § 152 to provide a bankruptcy court for the Virgin Islands.

With these observations, I concur.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3456

IN RE: JEFFREY J. PROSSER,

Debtor

JEFFREY J. PROSSER

v.

TOBY GERBER; FULBRIGHT & JAWORSKI, LLP;
RURAL TELEPHONE FINANCE COOPERATIVE;
DANIEL C. STEWART; JAMES J. LEE;
RICHARD LONDON; DUSTIN MCFAUL;
VINSON & ELKINS, LLP; STAN SPRINGEL;
JAMES P. CARROLL; FOX ROTHSCHILD, LLP;
GENOVESE, JOBLOVE & BATTISTA, P.A.;
PAUL BATTISTA; THERESA VAN VLIET;
ALVAREZ & MARSAL, LLC

NORMAN A. ABOOD; ROBERT F. CRAIG;
AND LAWRENCE H. SCHOENBACH,

Appellants

(D. VI. No. 3-19-cv-00048)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and RENDELL,* *Circuit Judges*

The Petition for Rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

s/ Marjorie O. Rendell
Circuit Judge

Dated: April 26, 2024
CJG/cc: William H. Stassen, Esq.
Norman A. Abood, Esq.
Lawrence H. Schoenbach, Esq.

* Pursuant to Third Circuit I.O.P. 9.5.3., the vote of Judge Rendell is limited to panel rehearing only.

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Bankr. No. 3:06-bk-30009

Adv. Pro. 3:10-ap-03001

Civil No. 3:19-cv-0048

In Re:

JEFFREY J. PROSSER

Debtor,

JAMES P. CARROLL, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF JEFFREY J. PROSSER

Plaintiff,

v.

TOBY GERBER, et al.

Defendants.

JUDGMENT

THIS MATTER is before the Court on the Joint Notice of Appeal filed by Norman A. Abood, Esq. ("Abood"), Lawrence H. Schoenbach, Esq. ("Schoenbach"), and Robert F. Craig, Esq. ("Craig") (collectively "Prosser Counsel"). For the reasons set forth below, Prosser Counsel's appeal shall be dismissed.

I

As the parties have not briefed this matter, the facts below are adduced from the records of Civil No. 3:19-cv-0048 and Bankr. No. 3:06-bk-3009.[1] On August 17, 2010, the bankruptcy court issued an order awarding legal fees and expenses against Prosser Counsel (the "Sanctions Orders"), finding that they had "unreasonably and vexatiously multiplied proceedings in bad faith, constituting violation of 28 U.S.C. § 1927 . . . ." (ECF No. 1-1 at 1.) After hearings on the matter and in consideration of the submission of bills of costs, James P. Carroll, Chapter 7 Trustee of the Bankruptcy Estate of Jeffrey J. Prosser ("Carroll") was ultimately awarded $137,024.02. *Id.*

Although Prosser Counsel initially made monthly payments to Carroll, per a stipulation dated May 8, 2012, Prosser Counsel failed to pay the sum in full. *Id.* After Carroll filed a notice of default on January 21, 2014, Prosser Counsel appealed the Sanctions Orders to this Court. *Id.* at 2. On February 14, 2014, the Court vacated the bankruptcy court order and remanded the matter for "further proceedings consistent with the Memorandum Opinion." *Id.* (*citing* Case No.: 3:11-cv-0136, ECF Nos. 21-22.). On remand, the bankruptcy court determined that "no further proceedings were necessary," and entered an order directing Carroll to return payments received. *Id.*

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[1] Unless otherwise indicated, citations refer to the instant matter, at Civil No 3:17-cv-0031.

Thereafter, Carroll appealed this Court's February 14, 2014 Order to the Third Circuit. *Id.* The Third Circuit reversed this Court's order on January 26, 2015, and remanded the matter directing this Court to reinstate the Sanction Orders. *Id.* at 2-3. On remand, the Court entered an order reinstating the bankruptcy court's sanction orders, filed on March 10, 2015.

Despite the order, Prosser Counsel did not make any additional payments. *Id.* at 3. On February 21, 2019, Carroll moved to convert the bankruptcy court's sanction orders to judgment pursuant to Fed. R. Civ. P. 58 (b)(2). (Case No. 3:06-bk-30009, ECF No. 4827 at 4.) Carroll further notes that because the sanction orders are for sum certain, judgment may be entered without the court's direction pursuant to Fed. R. Civ. P 58 (b)(1). *Id.* The bankruptcy court granted the motion and entered a Judgment in favor of Carroll on June 27, 2019. *See generally* ECF No. 1-1.

On July 2, 2019, Prosser Counsel filed their instant notice of appeal. Prosser Counsel seek to appeal the June 27, 2019 Judgment entered in favor of Carroll and against Prosser Counsel, jointly and severally, in the amount of $137,024.02. (ECF No. 1-1 at 3.)

On July 3, 2019, the Court entered a scheduling order, ordering, *inter alia,* that Prosser Counsel "shall, not later than ten (10) days after filing the Notice of Appeal, file and serve on the Clerk and other parties the designation of record and a statement of the issues to be presented, failing which the appeal may be dismissed for failure to prose-

cute . . . ." (ECF No. 2, at 1.) The Court further ordered that Prosser Counsel's "brief shall be filed and served within thirty (30) days of the designation of record on appeal . . . ." (ECF No. 2, at 2).

On July 8, 2019, Prosser Counsel filed a motion to stay "all Bankruptcy Proceedings and Bankruptcy Judgments related to [the June 27, 2019] Judgment . . . until this Court resolves this action *in total"*. (ECF No. 3) (emphasis in original). On July 11, 2019, Prosser Counsel filed their designation of record on appeal and statement of issues. (ECF No. 5.) The filing was timely. On November 12, 2020, Prosser Counsel filed a motion for leave to file document under seal and the proposed sealed documents. (ECF Nos. 9 and 10.) No brief has been filed to date.

II

As a preliminary matter, this Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(a). The Court has plenary authority to review the bankruptcy court's legal rulings but cannot disturb its factual findings unless it committed clear error. *See In re Schick,* 418 F.3d 321, 323 (3d Cir. 2005).

Here, the bankruptcy court made no error of law. Fed R. Civ. P. Rule 58(b)(1) provides: "Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when . . . the court awards only costs or a sum certain . . . ." The bankruptcy court was able

to reduce the award of costs and fees to $137, 024.02, or, a sum certain. Therefore, judgment was properly awarded, with or without the court's direction.[2]

Reviewing the record in this case for plain error, the Court finds no error, let alone plain error. Specifically, the bankruptcy court entered an order to reimburse the estate in the amount of $137,024.02. The order is on the record and was upheld by the Third Circuit. This is the only finding of fact necessary for entry of judgment under Rule 58(b).

Furthermore, "summary action is appropriate if there is no substantial question presented in the appeal." *In re Goforth,* 532 F. App'x 98, 100 (3d Cir. 2013) (citing 3rd Cir. LAR 27.4). By failing to abide by the Court's scheduling order and file a brief, or any legal argument whatsoever in the more than two years that this appeal has been pending, the Court finds that Prosser Counsel has failed to raise any substantial question in their appeal. Therefore, the Court will summarily affirm the bankruptcy court's judgment. Accordingly, it is hereby

ORDERED that the judgment of the bankruptcy court is **SUMMARILY AFFIRMED.** It is further

ORDERED that all pending motions are **MOOT.** And it is further

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[2] Because the Judgment was properly awarded under Fed. R. Civ. P. 58(b)(1)(B), the Court need not consider whether it was properly awarded under Fed. R. Civ. P. 58(b)(2).

ORDERED that the Clerk of Court shall **CLOSE THIS CASE.**

Dated: March 18, 2022

/s/ *Robert. A. Molloy*
ROBERT A. MOLLOY
Chief Judge

THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN, BANKRUPTCY DIVISION

Chapter 7

Case No. 06-30009 (MFW)

Related to Docket No. 4827

In re:

JEFFREY J. PROSSER,

Debtor.

Adv. Pro. 10-3001

Related to Docket No. 433

JAMES P. CARROLL, as Chapter 7 Trustee of the Estate of Jeffrey J. Prosser,

Plaintiff,

vs.

GERBER et al.,

Defendants.

JUDGMENT

AND NOW, this 26th day of June, 2019, ***WHEREAS***, on August 17, 2010, the Bankruptcy Court issued an Order Awarding Legal Fees and Expenses

Against Norman A. Abood, Esq., Robert F. Craig, Esq. and Lawrence H. Schoenbach, Esq. Pursuant to 28 U.S.C. § 1927, finding, among other things, that the Prosser Counsel[1] "have unreasonably and vexatiously multiplied proceedings in bad faith, constituting violation of 28 U.S.C. § 1927 by filing against the Trustee and Fox Rothschild the Complaint (10-03001, Adv. Doc. No. 1); the Motion for Waiver of Conflicts Hearing (10-03001, Adv. Doc. No. 2); Debtor's Objection to the Chapter 7 Trustee's Ninth Quarterly Fee Application (06-30009, Doc. No. 2694); and Debtor's Objection to Fox Rothschild LLP's Eighth Quarterly Fee Application (06-30009, Doc. 2695)" (DE 272);

WHEREAS, following the submission of bills of costs by the Trustee and hearings on the amount of sanctions to be awarded, on December 9, 2011, the Bankruptcy Court awarded fees and expenses against Messrs. Abood, Craig and Schoenbach, jointly and severally, in the amount of $137,024.02 (DE 313);

WHEREAS, on December 21, 2011, the Prosser Counsel appealed the Sanctions Orders to the District Court (DE 315);

WHEREAS, by stipulation dated May 8, 2012, the Prosser Counsel agreed to make monthly installment payments to the Trustee in satisfaction of the Sanctions Orders (DE 400);

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[1] Capitalized terms not defined herein shall have the definitions as set forth in the Motion.

WHEREAS, though the Prosser Counsel made some payments to the Trustee, they eventually stopped making payments before the Sanctions Orders were paid in full, thereby defaulting under the teens of the stipulation;

WHEREAS, the Trustee filed a notice of default on January 21, 2014 (DE 404);

WHEREAS, the Prosser Counsel failed to respond and at an omnibus hearing on February 12, 2014, this Court ruled that the Trustee could reduce the balance owed to judgment to allow the Trustee to execute the outstanding amount (DE 407);

WHEREAS, on February 14, 2014, the District Court vacated the Sanctions Orders and remanded the matter for further proceedings consistent with the Memorandum Opinion (11-cv-136, DE 21-22);

WHEREAS, this Court determined that no further remand proceedings were necessary and further ordered that the Trustee return the payments it had received from the Prosser Counsel (DE 419);

WHEREAS, the Trustee appealed to the Third Circuit on March 14, 2014 (11-cv-136, DE 24);

WHEREAS, on January 26, 2015, the Third Circuit reversed the District Court's Order vacating this Court's Sanctions Orders and remanded with instructions that the District Court reinstate the Order imposing them (Case No. 14-1633);

WHEREAS, on March 10, 2015, the District Court entered an order, in accordance with the Third Circuit's mandate, vacating its February 14, 2014

order and reinstating the Sanctions Orders (11-cv-136, DE 27);

WHEREAS, the Prosser Counsel filed an untimely motion for reconsideration of the District Court's Order reinstating the Sanctions Orders and, on March 30, 2016, the District Court denied the motion for reconsideration (11-cv-136, DE 37); and

WHEREAS, despite the reinstatement of this Court's Order requiring the Prosser Counsel reimburse the estate in the amount of $137,024.02 for legal fees unnecessarily expended because of the frivolous filings, the Prosser Counsel have ignored the Sanctions Orders and have made no payments in satisfaction of the Sanctions Orders.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

Judgment is hereby entered in favor of the Chapter 7 Trustee and against Norman A. Abood, Esq., Robert F. Craig, Esq. and Lawrence H. Schoenbach, Esq., jointly and severally, in the amount of $137,024.02.

Dated: June 26, 2019

/s/ MARY F. WALRATH
HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1633

IN RE:

JEFFREY J. PROSSER,

DEBTOR

JEFFREY J. PROSSER

v.

TOBY GERBER; FULBRIGHT AND JAWORSKI, LLP;
JAMES J. LEE; VINSON & ELKINS, LLP;
STAN SPRINGEL; JAMES P. CARROLL;
FOX ROTHSCHILD, LLP; GENOVESE,
JOBLOVE & BATTISTA, P.A.; PAUL BATTISTA;
THERESA VAN VLIET; ALVAREZ & MARSHAL, LLC

James. P. Carroll, Chapter 7 Trustee of
the bankruptcy estate of Jeffrey J. Prosser,

Appellant

APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS
(D.C. No. 3-11-cv-00136)
District Judge: Hon. Curtis V. Gomez

Argued: December 9, 2014

Before: CHAGARES, JORDAN, and SHWARTZ,
Circuit Judges.

(Filed: January 26, 2015)

OPINION

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SHWARTZ, *Circuit Judge*.

James P. Carroll, trustee of debtor Jeffrey J. Prosser's bankruptcy estate, appeals the District Court's order vacating the Bankruptcy Court's imposition of 28 U.S.C. § 1927 sanctions. The Bankruptcy Court imposed sanctions because of the numerous and inflammatory submissions Prosser's counsel filed in Prosser's bankruptcy and associated adversary proceeding. Because these filings vexatiously and unnecessarily multiplied the bankruptcy proceedings and the Bankruptcy Court did not abuse its discretion by imposing such sanctions, we will reverse the District Court's order vacating them.

I

Prosser filed a Chapter 11 bankruptcy petition in 2006. His petition was converted to a Chapter 7 petition and Carroll was appointed as trustee of

Prosser's estate. During the relevant portion of his bankruptcy proceedings, Prosser was represented by attorneys Norman Abood, Robert Craig, and Lawrence Schoenbach (collectively, the "Prosser Counsel"), and Carroll was represented by Fox Rothschild, LLP ("Fox Rothschild").

A trial took place in 2008 to adjudicate creditors' objections to Prosser's claim that certain property was exempt from the bankruptcy proceedings (the "Exemptions Trial"). Arthur Stelzer, Prosser's former "valet and personal assistant," App. 2652, testified for the creditors. He testified that Prosser asked him to destroy several of Prosser's computer hard drives after Prosser filed for bankruptcy. Based in part on Stelzer's testimony, the Bankruptcy Court denied the exemptions Prosser claimed. Thereafter, Carroll and others initiated an adversary proceeding, seeking denial of Prosser's discharge under 11 U.S.C. § 727(a), based on evidence that "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3).

In connection with this adversary proceeding, Prosser deposed Stelzer in an effort to undermine his testimony at the Exemptions Trial. During the January 12, 2010 deposition, at which the Bankruptcy Judge presided, the Prosser Counsel inquired into the payment of Stelzer's legal fees by third parties and contacts Stelzer had with Carroll and Carroll's counsel. With respect to his legal fees, Stelzer explained that he had felt "intimidated"

and "frightened" when first served with a subpoena in connection with the Exemptions Trial and that prompted him to seek legal representation. App. 81. Stelzer explained that these legal fees were paid either by the debtor companies or by the law firm representing the trustee in a separate but related Chapter 11 proceeding. When asked whether, as a result of this arrangement, Stelzer had an "understanding" that he would do something "in exchange for them paying for [his] fees," he replied, "[w]ell, if I'm called for whatever, just to come tell the truth." App. 80, 82.

As to Stelzer's contact with Carroll, Dana Katz, a Fox Rothschild attorney representing Carroll, stated to the Bankruptcy Judge that Carroll had "never spoken to Mr. Stelzer outside of trial testimony during the exemptions proceedings." App. 61. Stelzer, however, testified that he and Carroll once had dinner together "long before" Stelzer testified at the Exemptions Trial. App. 77. According to Stelzer, they discussed "how [Stelzer's] life was just in general," "general, light conversation," "[t]he wine [they] had for dinner," and "what it was like to work for Mr. Prosser, Mrs. Prosser, and the children, general, really general chitchat." *Id.* Stelzer testified that he and Carroll did not discuss Prosser's hard drives, Prosser's finances, or the possibility that Stelzer might later be called to testify in a future proceeding such as the Exemptions Trial.

Two weeks later, on January 26, 2010, the Prosser Counsel filed a motion for an evidentiary hearing into what they labeled an alleged bribery scheme,

asserting that Stelzer gave unfavorable testimony during the Exemptions Trial in exchange for "payment of his attorney fees in multiple litigations," App. 181, and that Carroll's counsel had misrepresented Carroll's contacts with Stelzer.[1] The District Court referred the motion to the Bankruptcy Judge on January 29, 2010. That same day, the parties coincidentally appeared before the Bankruptcy Court to address other matters. During the January 29, 2010 hearing, the Bankruptcy Court discussed the Prosser Counsel's motion for an evidentiary hearing and suggested it be opened as a "miscellaneous adversary" proceeding.[2]

During that hearing, William Stassen, a Fox Rothschild attorney, addressed the contacts between Carroll and Stelzer. He informed the Bankruptcy Court that Katz's statement that Carroll and Stelzer had never met prior to the Exemptions Trial was inaccurate and that Carroll

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[1] That same day, the Prosser Counsel also filed a motion to stay trial in the separate adversary proceeding relating to Prosser's request for a discharge.

[2] "Miscellaneous proceedings" and "adversary actions" are familiar vehicles for court proceedings, but an amalgam called a "miscellaneous adversary" is not, and the reference appears to be simply a misstatement when the Bankruptcy Court intended to propose the filing of a miscellaneous proceeding. That conclusion is borne out by the Court's later statement in a memorandum opinion that "Prosser was ordered to file the [motion for a hearing] in the main bankruptcy case . . . pending in the Bankruptcy Division so that the Court could open a Miscellaneous Proceeding but [the Prosser Counsel] filed this Adversary instead." App. 466 n.2.

had in fact met Stelzer for dinner before Fox Rothschild became Carroll's counsel. Stassen stated:

> [W]e will submit to the Court a corrected statement for the Court's record. Quite frankly, Your Honor, Ms. Katz is devastated. I mean, she's really upset that she made the representation to the Court. I can say emphatically that it was clearly not a knowing statement with regard to [Carroll] not having contact with Mr. Stelzer.

App. 596.[3] The Bankruptcy Court acknowledged Stassen's statement without comment, and the hearing moved on to other matters.

On January 31, 2010, apparently in response to the District Court's referral of their motion for an evidentiary hearing to the Bankruptcy Court, the Prosser Counsel issued a press release entitled "HEARING ORDERED ON BRIBERY SCHEME" in which they stated that Prosser was "the target of [an] alleged bribery scheme" through which Stelzer was provided with free legal services "in exchange for his testimony." App. 598. The following day, the Prosser Counsel filed an adversary complaint (the "Adversary Complaint") in Bankruptcy Court against Carroll and Fox Rothschild, among others, on the basis of their "apparent bribery" of Stelzer. App. 4. The Adversary Complaint repeated the

[3] On February 12, 2010, Katz filed a certification with the Bankruptcy Court to correct the record, stating she had learned after the deposition that Carroll "had met one time with Mr. Stelzer prior to his deposition in February 2008." App. 109.

allegation from their press release that Stelzer had been provided "free legal services . . . in exchange for his testimony." App. 598. It also quoted Stelzer's deposition testimony about his dinner with Carroll and asserted that Carroll was "attempt[ing] to distance [himself] from Mr. Stelzer," as shown by his counsel's statement that he and Stelzer had never interacted. App. 46. The Adversary Complaint contended that Fox Rothschild had "violated their duty of candor to the Court" by failing to report the alleged bribery scheme. App. 42. It further alleged that Carroll had failed to report this possible bribery scheme to the United States Attorney as required under 18 U.S.C. § 3057.[4] The Adversary Complaint sought discovery and a hearing "to determine whether sanctions, disqualification and/or referral for further disciplinary proceedings should be imposed." App. 3.

The same day the Prosser Counsel filed the Adversary Complaint, they also filed two objections to Carroll's and Fox Rothschild's quarterly applications for compensation and reimbursement of expenses (the "Fee Objections"), contending that "serious questions ha[d] arisen with regard to the conduct of [Carroll] and/or his [c]ounsel as [were] more fully detailed in the Adversary Complaint."

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[4] This statute provides, in pertinent part, that if a bankruptcy trustee has "reasonable grounds for believing" that a violation of federal law "relating to insolvent debtors . . . has been committed," the trustee "shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed." 18 U.S.C. § 3057(a).

App. 249-50. The following day, February 2, 2010, the Prosser Counsel filed a motion for a hearing regarding an alleged conflict of interest between Carroll and his attorneys (the "Conflicts Motion") arising from payment of Stelzer's legal fees from estate assets in exchange for Stelzer's testimony. The Conflicts Motion argued that Stelzer and Carroll's attorneys "may have engaged in criminal activity (i.e. bribery)." App. 103.

On March 10, 2010, the Bankruptcy Court dismissed the motion for an evidentiary hearing underlying the Adversary Complaint as against Fox Rothschild, holding that, "[b]ased on the corrections made orally by Fox Rothschild during the omnibus motions hearing on January 29, 2010 and in writing thereafter, it is clear that there is no issue in dispute with regard to the veracity of the representation." App. 468 (footnote omitted). That same day, the Bankruptcy Court denied the Conflicts Motion, holding that Carroll was not represented by conflicted counsel, that no specific conduct had been identified warranting an evidentiary hearing as to Carroll, and that the Conflicts Motion was based on Sixth Amendment law generally applicable only in criminal proceedings. On March 15, 2010, the Prosser Counsel voluntarily dismissed the claims embodied in the motion for an evidentiary hearing as against Carroll individually and withdrew the Fee Objections.[5]

[5] After the claims against Carroll were dismissed, the Bankruptcy Court asked the United States Trustee to refer the allegations to the United States Attorney, but it stated

On April 2, 2010, Carroll moved for legal fees and expenses against the Prosser Counsel pursuant to 28 U.S.C. § 1927, contending that the Adversary Complaint, the Fee Objections, and the Conflicts Motion "were so patently meritless that the Court can reach no conclusion other than that they were vexatiously filed for the purpose of multiplying the proceedings." App. 560.

The Bankruptcy Court granted Carroll's § 1927 motion against the Prosser Counsel. It found that "the litigation against Fox Rothschild should never have been initiated," as the misstatement that Carroll and Stelzer had never met prior to the Exemptions Trial "was a mistake, promptly corrected, and the matter could have been resolved without this suit by a simple phone call between counsel and the subsequent corrected statement to the Court." App. 1609. The Bankruptcy Court explicitly concluded that the Prosser Counsel had "unreasonably and vexatiously multiplied proceedings in bad faith, constituting [a] violation of 28 U.S.C. § 1927[,] by filing" the Adversary Complaint, the Fee Objections, and the Conflicts Motion, App. 1609,[6] and ultimately awarded Carroll $137,024.02

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that it did so only because the allegations were serious, not because it perceived a factual basis for the bribery accusation. The Bankruptcy Court ultimately decided that referral for a criminal or disciplinary investigation was unwarranted.

[6] Relatedly, the Bankruptcy Court stated at an earlier hearing in 2010 that it was "delayed from getting to the merits of particular motions because of all the subsidiary litigation, most of which seems to not have a great deal of merit." Supp. App. 109.

for the expenses associated with these filings and related proceedings.[7]

The Prosser Counsel appealed the Bankruptcy Court's sanctions order to the District Court. On February 14, 2014, the District Court held that the Bankruptcy Court erred by imposing sanctions. The District Court held that the Adversary Complaint and the Fee Objections could not have "multiplied" the adversary proceedings under § 1927 because § 1927 does not apply to a filing that initiates a proceeding, and the Fee Objections had been filed in the bankruptcy case, not the adversary proceeding. The District Court also stated that the Bankruptcy Court had not explained how the Prosser Counsel's actions were in bad faith, noting that "the litigation against Carroll was of limited duration" and that, while some evidence in the record suggested bad faith, other evidence suggested the Prosser Counsel's actions were not a result of "dilatory or aggressive litigation practices, but rather the legitimate zeal of attorneys representing

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[7] In a later opinion and order filed on December 20, 2011, the Bankruptcy Court spent nearly 110 pages exhaustively addressing Prosser's amended Adversary Complaint and the request for a referral of bribery allegations to the United States Attorney. After thoroughly reviewing the extensive record before it, the Bankruptcy Court dismissed the claims against the remaining parties and concluded that disqualification or referral for criminal or disciplinary investigation were not warranted, as it could "find no evidence of a bribery scheme," and while it was troubled by the use of estate assets to pay for a witness's counsel without court approval, it noted that, in general, "there is nothing improper about a third party paying legal fees for" Stelzer. App. 2731.

their client." App. 2868. For these reasons, the District Court "vacat[ed] the Bankruptcy Court's [orders imposing sanctions] and remand[ed] this matter for further proceedings consistent with this Memorandum Opinion." App. 2869.

On remand, the Bankruptcy Court concluded that, because the District Court had "found no bad faith" in the Prosser Counsel's conduct, "it would be a waste of time to do anything other than comply with the District Court's directions, which [it] read [to] require that, since the [sanctions] orders have been vacated, that the funds be returned." Supp. App. 921. The Bankruptcy Court thereafter entered an order directing Carroll to release from escrow sanctions payments that had been made up to that point. Order, *In re: Jeffrey J. Prosser*, No. 3:10-ap-03001 (Bankr. D.V.I. Mar. 18, 2014), ECF No. 424.

Carroll filed his Notice of Appeal on March 14, 2014, challenging the District Court's February 14 order.

II

We have jurisdiction over appeals from orders imposing sanctions pursuant to 28 U.S.C. § 158(d)(1); *see In re Miller*, 730 F.3d 198, 202-03 (3d Cir. 2013).[8] The Bankruptcy Court had jurisdic-

[8] The District Court resolved the appeal of the sanctions order after all other relevant proceedings were concluded. Thus, even if the appeal was premature when filed, there were no other relevant matters pending and hence it was ripe for adjudication by the time the District Court ruled. More-

tion pursuant to 28 U.S.C. § 157, and the District Court had jurisdiction to review the Bankruptcy Court's order under 28 U.S.C. § 158(a). Our review requires us to "'stand in the shoes' of the District Court and review the Bankruptcy Court's decision" to impose sanctions. *In re Pransky*, 318 F.3d 536, 542 (3d Cir. 2003) (quoting *In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631, 635 (3d Cir. 1998)). "The imposition or denial of sanctions is subject to abuse-of-discretion review." *Miller*, 730 F.3d at 203. "An abuse of discretion occurs when the court bases its opinion on a clearly erro-

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over, although the District Court's order vacated the Bankruptcy Court's order imposing sanctions and said it was remanding for further proceedings, its opinion stated that it was "revers[ing]" the sanctions decision, App. 2868, because it found, in essence, that no proceedings had been multiplied and no facts concerning bad faith had been established. Because the District Court held that § 1927 sanctions could not apply to the filing of an adversary complaint and that the facts did not support a finding of bad faith, the Bankruptcy Court reasonably concluded that the District Court's decision left it with only ministerial tasks relating to the return of sanctions funds that had been placed in escrow. *See* Supp. App. 921 (Bankruptcy Court stating: "I don't know how I can find differently, even on a remand. So I agree it would be a waste of time to do anything other than comply with the District Court's directions, which I read require that, since the orders [imposing sanctions] have been vacated, that the funds be returned."); *see also In re Pransky*, 318 F.3d 536, 541 (3d Cir. 2003) (noting bankruptcy court on remand was not required to do additional fact-finding but only to perform ministerial mathematical calculations). Accordingly, because the Bankruptcy Court was required to perform only ministerial tasks on remand, the order vacating the sanctions award was a final order. *Pransky*, 318 F.3d at 540.

neous finding of fact, an erroneous legal conclusion, or an improper application of law to fact." *LaSalle Nat'l Bank v. First Conn. Holding Grp., LLC*, 287 F.3d 279, 288 (3d Cir. 2002); *see also Pransky*, 318 F.3d at 542 (reviewing bankruptcy court's "findings of fact for clear error and its legal conclusions *de novo*"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 181 (3d Cir. 2002) (stating that bad faith under § 1927 is a finding of fact reviewable for clear error).

III

Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Such "sanctions are intended to deter an attorney from intentionally and unnecessarily delaying judicial proceedings, and they are limited to the costs that result from such delay." *LaSalle*, 287 F.3d at 288 (emphasis omitted). "[C]ourts should exercise this sanctioning power only in instances of a serious and studied disregard for the orderly process of justice." *Id.* (internal quotation marks and alteration omitted).

The language and purpose of the statute reflect that these sanctions are aimed at deterring lawyers' bad faith conduct that disrupts the administration of justice by multiplying proceedings in "any court of the United States." 28 U.S.C. § 1927. A bankruptcy court is a unit of a district court, and as a result, it may impose § 1927 sanctions. *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 105 (3d Cir. 2008). In the bankruptcy context, the proceedings include adjudication of both the bankruptcy petition and adversary proceedings, which are "essentially . . . self-contained trial[s]—still within the original bankruptcy case." *In re Mansaray-Ruffin*, 530 F.3d 230, 234 (3d Cir. 2008); *see also In re TCI Ltd.*, 769 F.2d 441, 442-44, 449-50 (7th Cir. 1985) (affirming § 1927 sanctions for filing of baseless amended complaint in adversary action during bankruptcy). Thus, the filing of an adversary complaint may multiply the proceedings in a bankruptcy case, as it can increase the cost of the entire bankruptcy proceeding of which it is a part.

The District Court incorrectly held that the only proceeding that could have been multiplied here was the adversary proceeding. This view both ignores the fact that the adversary proceeding was only a part of the bankruptcy case and fails to account for the barrage of other filings the Prosser Counsel submitted as part of the bankruptcy based on the very events that served as the basis for the Adversary Complaint. Thus, the District Court erred in focusing only on the filing of the Adversary Complaint and holding that such a filing could not constitute sanctionable conduct under § 1927.

Having concluded that the relevant proceedings include both the overarching bankruptcy and the associated adversary proceeding, we next examine whether the Bankruptcy Court's imposition of § 1927 sanctions constituted an abuse of discretion. To impose § 1927 sanctions, a court must "find an attorney has (1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) doing so in bad faith or by intentional misconduct." *Prudential*, 278 F.3d at 188. A court imposing § 1927 sanctions must find bad faith, but that finding need not be made explicitly. *Id.* at 189 ("An implicit finding of bad faith will support sanctions just as well so long as it is not an abuse of discretion, not based upon clearly erroneous factual findings, and not based upon an error of law."); *see also Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 209 (3d Cir. 1985) (finding bad faith standard was met "in light of the entire record and the expressions of the district court judge, who employed the very words of the statute"). "Indications of . . . bad faith are findings that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *Prudential*, 278 F.3d at 188 (internal quotation marks omitted).

We conclude that the Bankruptcy Court did not abuse its discretion in imposing sanctions, as its order did not rest on "a clearly erroneous finding of fact, an erroneous legal conclusion, or an improper application of law to fact." *LaSalle*, 287 F.3d at

288. Under the clearly erroneous standard of review, the record supports the Bankruptcy Court's finding that the Prosser Counsel had unreasonably and vexatiously multiplied and increased the cost of the proceedings in bad faith.[9] First, the Prosser Counsel multiplied the proceedings. The Adversary Complaint, request for referral to the United States Attorney, Fee Objections, and Conflicts Motion created new issues for Carroll and the Bankruptcy Court to address. Second, there is a basis for concluding that these filings were "unreasonabl[e] and vexatious[ ]." *Id*. These multiple filings were, as the Prosser Counsel admitted, prompted entirely by Stelzer's deposition testimony that a third party was paying his legal fees and by Katz's innocent mistake concerning Stelzer's contact with Carroll, which was quickly clarified on the record. As the Bankruptcy Court observed, the Prosser Counsel could have simply inquired into Stelzer's fee arrangement and resolved any confusion regarding his dinner with Carroll without initiating an adversary proceeding, filing motions and objections, or alleging a vast bribery scheme. The Prosser Counsel's failure to engage in such a reasonable inquiry to ensure their accusations had a basis in fact indicates that they engaged in objectively unreasonable conduct. Furthermore, as the Bankruptcy Court stated in its opinion declining to

[9] The District Court exceeded its appellate function by essentially substituting its view of the facts, rather than reviewing whether the Bankruptcy Court's factual findings were unsupported.

refer the matter for criminal or disciplinary action, the Prosser Counsel's process in advancing their bribery allegations was "suspect," in that they initially filed the motion for an evidentiary hearing in the District Court despite the fact that the Bankruptcy Court had witnessed Stelzer's deposition and had ordered the parties to address the issue, and despite the fact that the Prosser Counsel filed the Adversary Complaint after having reported the issue to the United States Attorney—part of the very relief they requested in their complaint. Moreover, they issued press releases "in an apparent effort to discredit [opposing] counsel." App. 2654. Third, the Prosser Counsel's repeated filings based on a single fact that did not substantiate the bribery accusation plainly delayed and increased the cost of the bankruptcy proceeding, as the parties and the Bankruptcy Court expended significant time and resources addressing them rather than the merits of the bankruptcy case. Fourth and finally, although the Bankruptcy Court's reasons for its finding of bad faith could have been more explicit, its finding was supported by both "the entire record" and its use of "the very words of the statute." *Baker Indus.*, 764 F.2d at 209.

The Prosser Counsel's bribery accusations and the tactics they employed, from the press release to the request for a referral to law enforcement to the motions, objections, and Adversary Complaint, all show a desire to read nefarious motives into a relatively unremarkable event with no proof that the allegedly bribed witness had been influenced at all. In light of this record, the Bankruptcy Court's fac-

tual finding of bad faith was not clearly erroneous, and the Court did not abuse its discretion by imposing sanctions under § 1927.

IV

For the foregoing reasons, we will reverse the District Court's order vacating the Bankruptcy Court's imposition of sanctions and remand with instructions that the District Court reinstate the order imposing them.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1633

IN RE: JEFFREY J. PROSSER,
Debtor

JEFFREY J. PROSSER

v.

TOBY GERBER; FULBRIGHT AND JAWORSKI, LLP;
JAMES J. LEE; VINSON & ELKINS, LLP;
STAN SPRINGEL; JAMES P. CARROLL;
FOX ROTHSCHILD, LLP; GENOVESE, JOBLOVE
& BATTISTA, P.A.; PAUL BATTISTA;
THERESA VAN VLIET; ALVAREZ & MARSHAL, LLC

James P. Carroll, Chapter 7 Trustee of
the bankruptcy estate of Jeffrey J. Prosser,
Appellant

(VI. D.C. No. 3-11-cv-00136)

SUR PETITION FOR REHEARING

Present: McKee *Chief Judge*, Rendell, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Greenaway, Jr., Vanaskie, Shwartz, and Krause *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

s/ Patty Shwartz
Circuit Judge

Dated: February 24, 2015
ARL/cc: NAA; RFC; LHS; SHI; WHS

IN THE DISTRICT COURT OF
THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Chapter 7
Case No. 06-30009 (JFK)

IN RE:

JEFFREY J. PROSSER

Debtor.

Civil No. 11-136

JEFFREY J. PROSSER

Plaintiff/Appellant,

v.

JAMES P. CARROLL, CHAPTER 7 TRUSTEE OF
THE BANKRUPTCY ESTATE OF JEFFREY J. PROSSER,

Defendant/Appellee.

ATTORNEYS:

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For the appellant,

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For the appellee.

MEMORANDUM OPINION

GÓMEZ, C. J.

Before the Court is the appeal of Lawrence H. Schoenbach, Esq. ("Schoenbach"), Robert F. Craig, Esq. ("Craig"), and Norman A. Abood, Esq. ("Abood") (collectively, "the Appellants") from the orders entered in an adversary proceeding by the Bankruptcy Division of this Court on August 17, 2010 and December 9, 2011, sanctioning the Appellants pursuant to 28 U.S.C. § 1927.

I. BACKGROUND[1]

The instant appeal arises out of a lengthy bankruptcy proceeding involving Innovative Communi-

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[1] The factual background is derived from filings in a bankruptcy case (3:06-bk-30009), two adversary proceedings

cation Corporation, a Virgin Islands telecommunications company, and its former owner, Jeffrey J. Prosser. At all relevant times, Prosser was represented by Law Office of Lawrence H. Schoenbach, Robert F. Craig, P.C., and The Law Office of Norman Abood.

On July 31, 2006, Prosser filed a Chapter 11 bankruptcy petition. His petition was subsequently converted to a petition for relief under Chapter 7 of the Bankruptcy Code. Thereafter, James P. Carroll was appointed as the trustee of Prosser's estate. Carroll is represented by Fox Rothschild, LLP ("Fox Rothschild").

During the course of the bankruptcy proceeding, Prosser claimed, pursuant to 11 U.S.C. § 522, that certain property was exempt from the reach of the Bankruptcy Court. Carroll and others filed objections to those claims. Those objections were adjudicated at a trial held in June, 2008 (the "exemptions trial"). Arthur J. Stelzer[2] testified as a lay witness at the exemptions trial.

On October 9, 2009, the Bankruptcy Court denied the exemptions claimed by Prosser (the "Exemptions Order"), finding "clear and convincing evidence of his bad faith and . . . blatant disregard of his obligations as a debtor." In so finding, the Bankruptcy Court relied, in part, on Stelzer's June 2008 trial testimony.

(3:08-ap-3011, 3:10-ap-3001) and a prior appeal to this Court (03:10-cv-08).

[2] Stelzer was formerly employed as Prosser's "valet and personal assistant." *In re Prosser*, 2011 Bankr. LEXIS 5009, at *14 (Bankr. D.V.I. Dec. 20, 2011).

Following the exemptions trial, Carroll and others initiated an adversary proceeding, seeking denial of Prosser's discharge under 11 U.S.C. § 727(a) (the "discharge adversary proceeding"). On December 2, 2009, Prosser noticed Stelzer's deposition. Prosser argued that Stelzer's testimony would (1) "bear directly and adversely on his credibility," (2) "undermine his prior testimony," (3) "evidence his personal and financial need to provide [the bankruptcy trustees] with favorable testimony, and (4) be directly relevant and probative of material issues (e.g., the complained of concealment of assets and alleged destruction of evidence) involved in this case." On December 8, 2009, Carroll sought to prevent the deposition. The Bankruptcy Court ultimately limited the deposition to "new matters" for the sole purpose of "supplement[ing] whatever evidence is already of the record" on issues "relevant to the discharge [adversary proceeding.]"

On December 15, 2009, Carroll moved for the denial of Prosser's discharge based on findings in the Exemptions Order. Carroll argued that Prosser was estopped from relitigating "various factual issues" previously litigated in the exemptions trial.

Stelzer was deposed on January 12, 2010. Issues raised during the deposition included (1) the payment of Stelzer's legal fees for services provided to him during the course of Prosser's bankruptcy proceedings and (2) Stelzer's conversations with Carroll and Fox Rothschild prior to testifying at the exemptions trial. The deposition focused on whether Carroll and Fox Rothschild, among others,

were bribing Stelzer to provide favorable testimony.

During his deposition, Stelzer testified, *inter alia*, as follows:

(1) "To the best of [his] knowledge," he "[thought]" his legal fees in Prosser's bankruptcy case and related proceedings were paid for by either the Chapter 11 bankruptcy estate or the Chapter 11 trustee's counsel. Stelzer Depo. at 122:23-25, 123:1-2, 130:8-16, 141:2-4 [Civil No. 11-136, ECF 18-1].

(2) In exchange for payment of his legal fees, "if [he was] called for whatever, just to come tell the truth." *Id.* at 130:17-24, 131:6-8, 141:2-4

(3) He "didn't talk to any of those people [from the Chapter 7 trustee's office] about [providing] any kind of testimony" at the June 2008 trial. *Id.* at 108:21-25, 109:1-3.

(4) Prior to the June 2008 trial, Stelzer met with Carroll on an unspecified date for a "dinner meeting." *Id.* at 109:17-18.

(5) It was his understanding that Carroll asked him to dinner because Carroll "was the trustee of the bankruptcy." *Id.* at 111:21-22.

(6) He and Carroll only discussed "what it was like to work for Prosser and his family" and "general chitchat." *Id.* at 111:21-25, 112:9-14.

(7) At the time of the "dinner meeting," he "didn't know about testifying at the [June 2008] trial." *Id.* at 112:9-12.

The Stelzer deposition was monitored telephonically by the Bankruptcy Court. Norman Abood and Lawrence Schoenbach, counsel for Prosser; Theresa Van Vliet and Patsy Zimmerman of Genovese, Joblove & Battista, P.A., counsel for Stelzer; James Lee, Dustin McFaul and Rebecca Petereit of Vinson & Elkins, LLP, counsel for the Chapter 11 trustee; Mark A. Platt and Greg M. Wilkes of Fulbright & Jaworski, LLP, counsel for Rural Telephone Finance Cooperative; and Dana Z. Katz of Fox Rothschild, counsel for Carroll, attended the deposition. At one point during the deposition, Abood sought to inquire of various financial records of Stelzer.[3] The Bankruptcy Court then questioned Abood as to the relevance of this information to Prosser's discharge. Abood ultimately explained that "[t]hey're relevant because Mr. Stelzer is being told by the trustees that Mr. Stelzer's testimony will be used to support the allegations of bad acts against Mr. Prosser. That raises his credibility." Counsel for the Chapter 11 trustee objected. The Bankruptcy Court ruled as follows:

> I have not seen evidence that Mr. Stelzer has been told any such thing by the trustee. If you want to substantiate that first, Mr. Abood, then perhaps. If in fact he's motivated to lie because the trustees suggested to him to lie, certainly that is relevant and you may pursue that.

[3] While Schoenbach also attended the Stelzer deposition on behalf of Prosser, only Abood questioned Stelzer.

Stelzer Depo. at 48:8-14 [Civil No. 11-136, ECF 18-1]. At that point, Katz, an attorney with Fox Rothschild, objected and made the unsworn statement that the

> Chapter 7 trustee has in fact never spoken to Mr. Stelzer outside of the trial testimony during the exemptions proceedings, so I'm not really sure what Mr. Abood is getting at, but I just wanted to make that clear that there have been no communications with Mr. Stelzer whatsoever.

Id. 48:15-23.

The following day, on January 13, 2010, the Bankruptcy Court issued an order (the "collateral estoppel order"), in which it precluded Prosser from challenging the Bankruptcy Court's findings in the exemptions trial during the discharge adversary proceeding.

On January 15, 2010, Prosser appealed the collateral estoppel order to this Court.[4] On January 26, 2010, Prosser moved for an evidentiary hearing (the "Evidentiary Hearing Motion") in that appeal "to determine whether sanctions, disqualification and/or referral for further disciplinary proceedings and/or referral to the appropriate U.S. Attorney should be made against" Carroll and Fox Rothschild, among others. In support of the motion, Prosser stated (1) a "serious question[]" exists as to

[4] The notice of appeal and related documents were each signed by Schoenbach, Craig and Abood. *See* Civil No. 2010-08 [ECF 1].

whether Fox Rothschild "violated [its] duty of candor to the Court" when Katz, on behalf of Fox Rothschild, stated there had been no communications between Carroll and Stelzer prior to the June 2008 trial, and (2) Carroll failed to report for investigation the alleged bribery scheme to the United States Attorney in violation of 18 U.S.C. § 3057.

On January 29, 2010, this Court referred the Evidentiary Hearing Motion to the Bankruptcy Court. The referral order provided as follows:

> Before the Court is the motion of Jeffrey Prosser ("Prosser") for an evidentiary hearing. The premises considered, it is hereby ORDERED that this matter is referred to Bankruptcy Judge Judith K. Fitzgerald for an evidentiary hearing.

January 2010 Order, Civil No. 2010-08 [ECF 9].

Also on January 29, 2010, the Bankruptcy Court held an omnibus hearing in the bankruptcy proceeding, during which William Stassen of Fox Rothschild stated "[i]t does appear that Ms. Katz's statement" made during Stelzer's deposition—that is, that Carroll had never spoken to Stelzer prior to the exemptions trial—"was not entirely accurate." In particular, Stassen stated that he had learned, after Stelzer's deposition, "that the Chapter 7 Trustee, Mr. Carroll, at one point in time prior to our firm of Fox Rothschild being retained to represent him[,] did [ ] have dinner with Mr. Stelzer way back at the very beginning of the case."

On February 1, 2010, Fox Rothschild filed two fee applications in the bankruptcy proceeding. That same day, Prosser, through Appellants, filed objections thereto (collectively, the "Fee Objections").

Also on February 1, 2010, Prosser, through Appellants, initiated an adversary proceeding (the "Prosser adversary proceeding") against Carroll and Fox Rothschild, among others.[5] In his adversary proceeding complaint (the "Complaint"),[6] Prosser asked that "discovery and a hearing be scheduled to determine specifically whether some or all" of the named defendants, including Carroll and Fox Rothschild, had (1) engaged in a bribery scheme of a lay witness, (2) failed to report to the United States Attorney in violation of 18 U.S.C. § 3057 that reasonable grounds existed warranting investigation of a possible bribery scheme, and (3)

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[5] The Prosser adversary proceeding also included as defendants the Chapter 11 Trustee, Vinson & Elkins, LLP, Genovese, Joblove & Battista, P.A., Fulbright & Jaworski, LLP, and Alvarez & Marsal.

[6] During the January 29, 2010 hearing in the bankruptcy matter, the Bankruptcy Court advised the parties that this Court's referral would be "opened as a miscellaneous adversary" because "it's going to be a new independent adversary with a life of its own." *See* 03:06-bk-30009, Jan. 29, 2010 Tr. at 113:23-24, 116:4-5. The Bankruptcy Court instructed Prosser to "file it at [sic] the [bankruptcy] case and as an adversary." *Id.* at 116:6-7; *but see* 03:10-ap-3001, March 10, 2010 Mem. Opinion & Order at 2 n.2 (stating Prosser was "ordered to file the [Evidentiary Hearing Motion] . . . in the main bankruptcy case (3:06-bk-30009) . . . . so that the Court could open a Miscellaneous Proceeding but filed this Adversary [Proceeding] instead").

violated numerous rules of the ABA Rules of Professional Conduct, including the duty of candor to the Bankruptcy Court. The Complaint incorporated the Evidentiary Hearing Motion.

On February 2, 2010, Prosser, through Appellants, moved for a waiver of conflicts hearing (the "Conflicts Motion"). Prosser claimed that a potential conflict of interest existed between, *inter alia*, Fox Rothschild and Carroll.

On February 12, 2010, Katz filed a certification of counsel "to correct the record based on an inadvertent misstatement [she] made" during Stelzer's deposition (the "Katz Certification"). In particular, Katz stated that subsequent to the deposition, she "learned that the Chapter 7 Trustee had met one time with Mr. Stelzer prior to his deposition in February 2008" and "that this meeting was part of the fulfillment of the Chapter 7 Trustee's duty to investigate issues related to potential estate assets and to assist with the administration of the chapter 7 estate."

In a letter dated February 22, 2010, Carroll provided notice to the Appellants, pursuant to Rule 9011(c) of the Federal Rules of Bankruptcy Procedure, of his intent to file a motion for sanctions against Prosser unless he withdrew the Complaint, Fee Objections and the Conflicts Motion. On March 10, 2010, the Bankruptcy Court dismissed the Prosser adversary proceeding as against Fox Rothschild, and also denied the Conflicts Motion. On March 15, 2010, Prosser voluntarily dismissed the Prosser adversary proceeding against Carroll and withdrew the Fee Objections.

On April 2, 2010, Carroll filed a motion seeking legal fees and expenses against Abood, Craig and Schoenbach pursuant to 28 U.S.C. § 1927 (the "2010 Fee Petition"). In particular, Carroll sought fees and costs for his defense of the Prosser adversary proceeding, the Conflicts Motion, and the Fee Objections. On May 7, 2010, the Bankruptcy Court held oral argument on the 2010 Fee Petition. On August 17, 2010, the Bankruptcy Court granted the 2010 Fee Petition (the "August 17, 2010 Order") against Abood, Craig and Schoenbach. The Bankruptcy Court also directed Carroll to

> submit a bill of costs and expenses, including all attorneys' fees and expenses incurred in the Complaint (10-03001, Adv. Doc. No. 1); the Motion for Waiver of Conflicts Hearing (10-03001, Adv. Doc. No. 2); Debtor's Objection to the Chapter 7 Trustee's Ninth Quarterly Fee Application (06-30009, Doc. No. 2694); and Debtor's Objection to Fox Rothschild LLP's Eighth Quarterly Fee Application (06-30009, Doc. No. 2695).

Thereafter, the Bankruptcy Court held a hearing to determine appropriate fees and costs to award Carroll. Over a year later, on December 9, 2011, the Bankruptcy Court awarded Carroll $137,024.02 in fees and expenses (the "December 9, 2011 Order").

On December 21, 2011, Schoenbach, Craig and Abood initiated the instant appeal of the August 17, 2010 Order and the December 9, 2011 Order (collectively referred to herein as the "Sanctions

Orders"). On appeal, the Appellants challenge the Bankruptcy Court's jurisdiction to enter the Sanctions Orders and contend the Bankruptcy Court abused its discretion in sanctioning them.

II. JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 158, which provides in relevant part: "The district courts of the United States shall have jurisdiction to hear appeals [] from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges" under 28 U.S.C. § 157. *Id.* § 158(a)(1). Since the attorney's fee award has been quantified, the Sanctions Orders are "final" orders. *See Szostek v. Hart*, 123 B.R. 719, 721 (E.D. Pa. 1991) (noting "awards of attorney's fees do not become final until such time as the fees are quantified") (citing *Frangos v. Doering Equip. Corp.*, 860 F.2d 70, 72 (3d Cir. 1988)).

On an appeal, a district court "may affirm, modify, or reverse a bankruptcy [court's] [] order, or . . . remand with instructions for further proceedings." FED. R. BANKR. P. 8013. The primary question before a court reviewing the imposition of sanctions "is whether the sanctioning court abused its discretion." *Fellheimer, Eichen & Braverman v. Charter Technologies*, 57 F.3d 1215, 1223 (3d Cir. 1995) (citation omitted). "[A]n abuse of discretion will be found if the bankruptcy judge acted in an irrational, arbitrary or capricious manner clearly

contrary to reason and not justified by the evidence." *In re Murpenter LLC*, 2012 U.S. Dist. LEXIS 180837, at *7 (E.D. Pa. Dec. 20, 2012) (citation omitted); *see also In re SGL Carbon Corp.*, 200 F.3d 154, 159 (3d Cir. 1999) (explaining an abuse of discretion exists if the "court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact")(citation omitted).

While the ultimate decision to award sanctions is reviewed for an abuse of discretion, the bankruptcy court's underlying factual findings leading to that conclusion are reviewed for clear error, and its legal conclusions are reviewed de novo. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81 (3d Cir. 1988); FED. R. BANKR. P. 8013; *accord In re Barbel*, Civil No. 01-221 (RLF), 2004 U.S. Dist. LEXIS 19417, at *2 (D.V.I. Sept. 21, 2004). A finding of fact is clearly erroneous when it is "completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data." *Kool*, *Mann*, *Coffee & Co. v. Coffey*, 300 F.3d 340, 361 (3d Cir. 2002); *see In re CellNet Data Sys., Inc.*, 327 F.3d 242, 244 (3d Cir. 2003) ("A factual finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") (internal quotation marks omitted); *Parts & Electric Motors*, *Inc. v. Sterling Electric*, *Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) ("To be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must . . .

strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish.") (alterations added).

III. ANALYSIS

Schoenbach, Craig and Abood raise the following issues on appeal:[7]

(1) "Whether the Bankruptcy Court acted beyond the scope of this Court's referral by going beyond holding an evidentiary hearing with a resulting report and instead ordering sanctions pursuant to 28 U.S.C. § 1927;"

(2) "Whether the Bankruptcy Court erred in sanctioning Appellants for requesting an evidentiary hearing (based on the deposition testimony of a lay witness) to determine whether the Chapter 11 and Chapter 7 Trustees, and their respective counsel, had engaged in conduct that was unethical and possibly criminal;"

(3) "Whether the Bankruptcy Court erred as a matter of law and abused its discretion in assessing sanctions against Appellants under 28 U.S.C. § 1927 based on their having filed the Motion that resulted in this Court's Order referring the matter to the Bankruptcy Court;" and

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[7] The Court identifies the issues on appeal consistent with its analysis herein and not in the order presented by the Appellants.

(4) "Whether the Bankruptcy Court erred as a matter of law and abused its discretion in sanctioning Appellants in the amount of $137,024.02."

A. Bankruptcy Court's Authority to Impose Sanctions under § 1927

Schoenbach, Craig and Abood first assert that the bankruptcy judge erred by going beyond the scope of her reference and imposing sanctions. The United States Court of Appeals for the Third Circuit has had occasion to address this issue.

In *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90 (3d Cir. 2008), a bankruptcy court ruled that it could not impose sanctions under § 1927. The district court affirmed. On appeal, the Third Circuit reversed and held that the bankruptcy court "had the authority to impose sanctions . . . under § 1927." *Id.* at 105. That authority is not undermined where, as here, a referral is made.[8]

Accordingly, the bankruptcy court did not exceed its authority by imposing sanctions under § 1927. While the Court concludes the bankruptcy court was within its authority to consider and impose sanctions under § 1927, the Court's analysis does not end here. The remaining issues raised by the Appellants focus on whether the Bankruptcy Court abused its discretion by imposing sanctions here.

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[8] Indeed, the bankruptcy court is "a unit of the district court," *In re Schaefer Salt Recovery, Inc.*, 542 F.3d at 105, which is clearly authorized to impose sanctions under § 1927.

B. Legal Standard for the Imposition of Sanctions

Pursuant to 28 U.S.C. § 1927,

> [a]ny attorney . . . in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions for attorney misconduct under § 1927 should be imposed "only in instances of a serious and studied disregard for the orderly process of justice." *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986). To that end, the imposition of sanctions under § 1927 requires a finding of bad faith on the part of the offending attorney. *Zuk v. Eastern Pa. Psychiatric Inst. of the Medical College*, 103 F.3d 294, 297 (3d Cir. 1996); *see Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990) (explaining the Third Circuit has interpreted the "term 'vexatious' . . . as requiring a showing of bad faith"). "Although the court need not make an express finding of bad faith in so many words, there must at least be statements on the record which this court can construe as an implicit finding of bad faith." *Zuk*, 103 F.3d at 298 (internal citation omitted); *accord In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 189 (3d Cir. 2002); *see Loftus v. SEPTA*, 8 F. Supp. 2d 458, 461 (E.D. Pa. 1998) ("When a claim is advocated

despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebuttable defense, bad faith can be implied."); *see Salovaara v. Eckert*, 222 F.3d 19, 35 (2d Cir. 2000) (stating "bad faith may be inferred only if actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay") (internal quotation marks omitted).

"Bad faith" in the context of § 1927 may be shown through "the intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay." *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986); *see also Hicks v. Arthur*, 891 F. Supp. 213, 215 (E.D. Pa. 1995) (holding that "[bad faith] can be demonstrated either by showing an ulterior motive, or misconduct such as knowingly using perjured testimony, citing as binding authority overruled or non-binding cases, or otherwise misrepresenting facts or law to the court."). Additionally, "even if a lawsuit was initially filed in good faith, sanctions may be imposed on an attorney for all costs and fees incurred after the continuation of the lawsuit which is deemed to be in bad faith." *Loftus v. SEPTA*, 8 F. Supp. 2d 458, 461 (E.D. Pa. 1998).

C. The Bankruptcy Court's Imposition of Sanctions under § 1927

In the Bankruptcy Court's August 17, 2010 Order, it concluded that the Appellants "unreasonably and vexatiously multiplied proceedings in bad

faith . . . by filing against Trustee Carroll and Fox Rothschild" the Complaint, the Fee Objections and the Conflicts Motion. *See* August 17, 2010 Order. The Bankruptcy Court's order gives the Court some pause.

First, neither the Complaint nor the Fee Objections multiplied the Prosser adversary proceeding. The language of § 1927 makes clear that it only applies to unnecessary filings after the lawsuit has begun. *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 65 (1st Cir. 2008) (explaining "a lawyer cannot violate section 1927 in the course of commencing an action"); *see In re Schaefer Salt Recovery*, *Inc.*, 542 F.3d at 101 (stating "§ 1927 explicitly covers only the multiplication of proceedings that prolong the litigation of a case and likely not the initial pleading, as the proceedings in a case cannot be multiplied until there *is* a case") (emphasis in original); *Steinert v. Winn Group*, *Inc.*, 440 F.3d 1214, 1225 (10th Cir. 2006) (holding the "unambiguous statutory language [of § 1927] necessarily excludes the complaint that gives birth to the proceedings, as it is not possible to multiply proceedings until after those proceedings have begun"). Accordingly, the Appellants may not be sanctioned under § 1927 for filing the Complaint.

Sanctions for the Fee Objections are similarly problematic. It is well established that "sanctions under § 1927 must only impose costs and expenses that result from the particular misconduct *in the litigation at issue*." *Dashner v. Riedy*, 197 Fed. Appx. 127, 133 (3d Cir. 2006) (citation omitted) (emphasis added). The litigation at issue here is

the Prosser adversary proceeding. The Fee Objections were filed in Prosser's bankruptcy case. Clearly, they were not filed in the "litigation at issue." Thus, the Appellants also may not be sanctioned under § 1927 for filing the Fee Objections.[9]

Second, the conclusory findings of the Bankruptcy Court prevent this Court from conducting a meaningful review as to whether the Appellants protracted the litigation against Fox Rothschild and Carroll in a vexatious manner by their continued prosecution of Prosser's claims after the filing of the Complaint. With respect to the litigation against Fox Rothschild, the Bankruptcy Court stated, without elaboration, that,

> the alleged 'lack of candor' of a Fox Rothschild attorney was no such thing. The statement was a mistake, promptly corrected, and the matter could have been resolved without this suit by a simple phone call between counsel and the subsequent corrected statement to the Court. . . . [T]he litigation against Fox Rothschild should never have been initiated.

August 17, 2010 Order [ECF 1-1].

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[9] This is not to say, however, that the Bankruptcy Court lacks authority to impose sanctions for filing the Complaint and the Fee Objections. The Bankruptcy Court is vested with authority, apart from § 1927, to impose sanctions on counsel. In particular, sanctions pursuant to Rule 9011(c)(1)(B), sanctions under 11 U.S.C. § 105 and a court's inherent power to sanction are alternative "sanctioning tools" available to the Bankruptcy Court. *Miller v. Miller (In re Miller)*, 730 F.3d 198, 206 (3d Cir. 2013).

The Appellants' concern that Stelzer's testimony during the June 2008 trial had been influenced by communications with Carroll prior thereto is a fair interpretation of the record as presented to this Court. Obviously Stelzer's testimony and Katz's statement as to whether any such communications took place were in direct contradiction to one another. The Third Circuit has counseled that "[b]ad faith should not be lightly inferred, and counsel should be given *significant leeway* to pursue arguments on a client's behalf." *Lewis v. Smith*, 480 Fed. Appx. 696, 699 (3d Cir. 2012) (alteration and emphasis added). While Fox Rothschild relies on the oral correction to the record, which preceded the filing of the Complaint, the correction was not made by Katz. In fact, it was not until *two weeks after the initiation of the litigation* against Fox Rothschild that Katz filed her written correction. As such, the Court does not view the record as supporting a determination that the Appellants operated outside the bounds of zealous representation of their client when they pursued the litigation against Fox Rothschild, at least up until the filing of the Katz Certification.

The record suggests, however, that the Appellants were aware that Fox Rothschild had reversed its position shortly after the commencement of this litigation and in particular, at the point at which the Katz Certification was filed. *See Salvin v. Am. Nat'l Ins. Co.*, 281 Fed. Appx. 222, 225 (4th Cir. 2008) (affirming district court's finding that counsel's refusal to dismiss a claim once he knew his client's claim lacked merit was "sufficient to sup-

port a determination that [counsel] acted in bad faith"). Pursuing a litigation position after it becomes apparent that the asserted position is meritless may lead to a colorable claim of bad faith. *Loftus v. SEPTA*, 8 F. Supp. 2d 458, 462 (E.D. Pa. 1998) (stating "[a]s an officer of the court, [counsel] was not free to press on with a meritless claim until forced to surrender by the legal artillery of his adversaries" and "by failing to withdraw" the case once it lost legal merit, counsel acted in bad faith) (alterations added); *Murphy v. Hous. Auth. & Urban Redevelopment Agency*, 158 F. Supp. 2d 438, 451 (D.N.J. 2001) (stating under § 1927, "only those fees and costs associated with 'the persistent prosecution of a meritless claim' may be awarded") (quoting *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875 (5th Cir.1988)). In this case, though, the Bankruptcy Court simply made the broad statement that "the litigation against Fox Rothschild should never have been initiated." *See* August 17, 2010 Order ¶ 1. The order lacks any explanation for the Bankruptcy Court's finding that Katz's "statement was a mistake." *Cf. Gundacker v. Unisys Corp.*, 151 F.3d 842, 849 (8th Cir. 1998) (affirming district court's imposition of sanctions pursuant to § 1927 based on findings that counsel "disobeyed court orders, violated his duty as an officer of the court by making false representations, spoke to at least one member of the press concerning this and an ongoing, sealed *qui tam* action, and made various threats directed at the court"). Similarly, the Bankruptcy Court's order does not develop the legal standard or factual basis

to conclude in such a summary fashion that there was no legal merit to the litigation against Fox Rothschild.[10]

Also, the litigation against Fox Rothschild was not marked by months of litigation or voluminous filings. Indeed, the litigation against Fox Rothschild was of extremely short duration, beginning February 1, 2010 and terminating just over six weeks later on March 10, 2010. Moreover, a review of the docket indicates proceedings involving the litigation against Fox Rothschild were limited to the following: (1) the motion to dismiss the Complaint, a response and a reply; (2) Prosser's supplement to the Evidentiary Hearing Motion; and (3) a pretrial and discovery conference regarding the Complaint. The Bankruptcy Court did not explain how any of these actions or any others taken by the Appellants in pursuit of the claim against Fox Rothschild unreasonably multiplied the proceedings.

With respect to the litigation against Carroll, Prosser alleged that Carroll, as trustee, had an obligation under 18 U.S.C. § 3057 to refer the alleged bribery scheme to the U.S. Attorney upon learning of the scheme. The August 17, 2010 order, however, contains no factual findings as to this allegation. The Court's independent review of the record suggests on the one hand that Prosser may have had a reasonable, good faith basis for pursu-

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[10] The Court hastens to note that legal merit for a colorable claim should not be equated with what is required for a winning claim.

ing the litigation against Carroll, at least initially. For example, during a February pretrial and discovery conference, the Bankruptcy Court, after hearing argument regarding discovery concerning the alleged bribery scheme, stated as follows:

> I am going to permit discovery. This is a very serious allegation, and we're going to get to the bottom of it one way or another. So discovery will take place. Whether it's necessary as to Mr. Carroll, frankly, *I'm not sure. There doesn't seem to be any issue* concerning Mr. Carroll and his law firm in these alleged bribery allegations . . . .

February 26, 2010 Hr'g Tr. at 98:6-11 [3:10-ap-3001, ECF 60] (emphasis added). This statement suggests that further investigation of Carroll was not so beyond the pale as to be deemed for an unreasonable and vexatious purpose. Furthermore, on March 11, 2010, the Bankruptcy Court directed the United States Trustee to refer the alleged bribery scheme to the United States Attorney.[11]

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[11] During a hearing held on March 30, 2010, the Bankruptcy Court explained as follows:

> I did ask the U.S. Trustee's Office . . . to refer this to the United State Attorney . . . . But, I have said consistently that I did so only because the allegations are serious. And, frankly, I don't know what the outcome of those allegations will be. It may be that the request for this relief itself should be referred to the U.S. Attorney, and as a result I thought the U.S. Attorney should be aware of the entire complaint. There is no basis, as I am aware yet, for any indication that there has been a bribery of Mr. Stelzer or Mr. Stelzer's counsel. That is what the

This referral suggests the Appellants' claim against Carroll pursuant to 18 U.S.C. § 3057 was not for dilatory or aggressive litigation practices, but rather the legitimate zeal of attorneys representing their client. On the other hand, the Bankruptcy Court's oral comments during the May 7, 2010 hearing suggest otherwise:

> "With respect to Mr. Carroll, the fact that he met with Mr. [Stelzer] well in advance of any of these alleged bribery issues . . . [,] I also indicated that I saw no basis for the claim against Mr. Carroll. I didn't see it in the motion, and I didn't see it subsequently."

May 4, 2010 Hr'g Tr. at 125:25 – 126: 1-7 [3:10-ap-3001, ECF 277-7]. In short, the absence of any explanation regarding whether the Appellants' pursuit of litigation against Carroll was in bad faith requires reversal of the sanctions decision.

Finally, the litigation against Carroll was of limited duration, ending just five days after the litigation against Fox Rothschild. Indeed, following the Bankruptcy Court's referral of the alleged bribery matter to the United States Trustee, Prosser

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> evidentiary hearing is to set forth, whether [ ] there is [ ] reasonable grounds, to believe that it happened. That's all. So, I cannot agree that the reference to the U.S. Attorney's Office is the means all and end all. The burden here, as I understand it, is to substantiate whether there is reasonable grounds and I haven't yet heard the evidence to determine whether there are such reasonable grounds.

See 3:10-ap-3001, March 30, 2010 Tr. at 9:1-20 [ECF 156]; *see also id.* [324-2].

promptly voluntarily dismissed the action against Carroll on March 15, 2010. Moreover, a review of the docket indicates proceedings involving the litigation against Carroll were limited to the following: (1) the motion to dismiss the Complaint, a response and a reply; (2) Prosser's Conflicts Motion and Carroll's objection thereto; (3) Prosser's supplement to the Evidentiary Hearing Motion; (4) a pretrial and discovery conference regarding the Complaint; and (5) a hearing on the motion to dismiss. The lack of findings explaining how or in what manner the pursuit of litigation against Carroll multiplied the proceedings renders a meaningful review impossible.

IV. CONCLUSION

For the reasons stated herein, the Court will vacate the Bankruptcy Court's August 17, 2010 Order and the December 9, 2011 Order and remand this matter for further proceedings consistent with this Memorandum Opinion. An appropriate Order follows.

S_____

Curtis V. Gómez
Chief Judge

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
BANKRUPTCY DIVISION

Chapter 7

Case No. 06-30009

In re:

JEFFREY J. PROSSER,

Debtor.

Adv. Pro. 10-03001 (JKF)

Re: 420

JEFFREY J. PROSSER,

Plaintiff,

v.

TOBY GERBER; FULBRIGHT & JAWORSKI, LLP; RURAL TELEPHONE FINANCE COOPERATIVE; DANIEL C. STEWART; JAMES J. LEE; RICHARD LONDON; DUSTON MCFAUL; VINSON & ELKINS LLP; STAN SPRINGEL, CHAPTER 11 TRUSTEE OF INNOVATIVE COMMUNICATION CORP. AND INNOVATIVE COMMUNICATION COMPANY LLC, AND EMERGING COMMUNICATIONS, INC.; JAMES P. CARROLL, CHAPTER 7 TRUSTEE OF THE ESTATE OF JEFFREY J. PROSSER;

FOX ROTHSCHILD LLP; GENOVESE, JOBLOVE & BATTISTA, PA; PAUL BATTISTA; THERESA VAN VLIET; JANE DOE; JOHN DOE; AND ALVAREZ & MARSAL,

Defendants.

ORDER DIRECTING CHAPTER 7 TRUSTEE TO RETURN SANCTIONS PAYMENTS TO COUNSEL FOR JEFFREY PROSSER (LAWRENCE H. SCHOENBACH, NORMAN A. ABOOD, AND ROBERT F. CRAIG)

AND NOW, this 18th day of March 2014, ***WHEREAS,*** on December 9, 2011, the Court entered an Order Granting the Chapter 7 Trustee's Motion For Legal Fees And Expenses Against Norman A. Abood, Esq., Robert F. Craig, Esq. And Lawrence H. Schoenbach, Esq. Pursuant To 28 U.S.C. § 1927, awarding fees and expenses to the Chapter 7 Trustee in the amount of $137,024.02, and directing Messrs. Abood, Craig and Schoenbach, jointly and severally, to pay to the Chapter 7 Trustee the sum of $137,024.02 (the "Sanctions Award") within thirty (30) days of the date of the Order [Dkt. No. 313];

WHEREAS, on April 10, 2012, the Court filed a Rule to Show Cause Why Counsel for Jeffrey J. Prosser (Lawrence H. Schoenbach, Norman A. Abood, and Robert F. Craig) Should Not Be Held In Civil Contempt And Sanctioned For Failure To Comply With This Court's Order Of December 9, 2011 [Dkt. No. 385];

WHEREAS, the parties entered a Stipulation (the "Rule to Show Cause Stipulation") for Resolution of Rule to Show Cause Why Counsel for Jeffrey Prosser (Lawrence H. Schoenbach, Norman A. Abood, and Robert F. Craig) Should Not be Held in Civil Contempt and Sanctioned For Failure to Comply with this Court's Order of December 9, 2011 (the "Stipulation"), which was filed under seal on May 8, 2012 [Dkt. No. 400];

WHEREAS, the Stipulation set forth the terms and conditions by which Messrs. Abood, Craig and Schoenbach were to make monthly payments (the "Monthly Payments"), jointly and severally, to satisfy the Sanctions Award, which were to be held in escrow and to be treated as payments toward security in lieu of an appeal bond;

WHEREAS, Messrs. Abood, Craig, and Schoenbach have paid to the Chapter 7 Trustee the sum of Ninety-Nine Thousand ($99,000.00) pursuant to the Stipulation; and

WHEREAS, the Chapter 7 Trustee filed the Notice of Default of the Rule to Show Cause Stipulation on January 21, 2014 and the Court heard argument on the Rule to Show Cause on February 11, 2014 and directed the Chapter 7 Trustee to submit a proposed order authorizing the Chapter 7 Trustee to release from escrow to the Chapter 7 estate all Monthly Payments made pursuant to the Rule to Show Cause Stipulation (in the amount of $99,000) to partially satisfy the Sanctions Award and permitting judgment to be entered in favor of the

Chapter 7 Trustee and against Messrs. Abood, Craig and Schoenbach, jointly and severally, for the remaining sums owed pursuant to the Sanctions Award in the amount of $38,024.02; and

WHEREAS, on February 14, 2014, the District Court for the Virgin Islands issued a Memorandum Opinion [Doc No. 21, 3:11-cv-00136] and a related order [Doc. No. 22, 3:11-cv-00136], vacating this Court's August 17, 2010 Order and December 9, 2011 Order and remanding the case to this Court for further proceedings; and

WHEREAS, the Court considered the papers filed by the Chapter 7 Trustee and Messrs. Abood, Craig, and Schoenbach and on March 13, 2014 heard argument on the District Court's Memorandum Opinion and Order remanding the matter to this Court; and

WHEREAS, the Court held that further proceedings on the District Court's remand of the matter would not be necessary in order to make a determination on the Sanctions Award and therefore, the District Court's Order dated February 14, 2014 is a final, appealable order; and

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Chapter 7 Trustee is Ordered to release from escrow within 72 hours from the date of entry of this Order to Lawrence H. Schoenbach (on behalf of Messrs. Abood, Craig, and Schoenbach) by bank-to-bank wire transfer all Monthly Payments made

pursuant to the Rule to Show Cause Stipulation (in the amount of $99,000).

2. The Chapter 7 Trustee's Notice of Default and request for related relief [Doc. No. 404] is dismissed as moot.

Dated: March 18, 2014

/s/ MARY F. WALRATH
HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
BANKRUPTCY DIVISION

Case No. 06-30009 (JKF) Chapter 7

Related to Doc. No. 2788

IN RE:

JEFFREY J. PROSSER,

Debtor.

Adv. Proc. No. 10-03001

Related to Doc. No. 143

JEFFREY J. PROSSER,

MOVANT,

v.

TOBY GERBER, FULBRIGHT & JAWORSKI, L.L.P., JAMES J. LEE, VINSON & ELKINS, L.L.P., STAN SPRINGEL, CHAPTER 11 TRUSTEE OF INNOVATIVE COMMUNICATION CORPORATION AND INNOVATIVE COMMUNICATION COMPANY, LLC AND EMERGING COMMUNICATIONS, INC., JAMES P. CARROLL, CHAPTER 7 TRUSTEE OF THE ESTATE OF JEFFREY J. PROSSER, FOX ROTHSCHILD, L.L.P., GENOVESE, JOBLOVE & BATTISTA, P.A.,

PAUL BATTISTA, THERESA VAN VILET, AND ALVAREZ & MARSAL, LLC,

RESPONDENTS.

ORDER GRANTING TRUSTEE CARROLL'S MOTION FOR LEGAL FEES AND EXPENSES AGAINST NORMAN A. ABOOD, ESQ., ROBERT F. CRAIG, ESQ. AND LAWRENCE H. SCHOENBACH, ESQ. PURSUANT TO 28 U.S.C. § 1927

This matter having been opened to the Court by James P. Carroll ("Trustee Carroll"), the Chapter 7 Trustee for the estate of Jeffrey J. Prosser ("Debtor"), for an award of counsel fees and expenses (the "Motion") against Mr. Prosser's three attorneys, Norman A. Abood, Esquire, Robert F. Craig, Esquire and Lawrence H. Schoenbach, Esquire, as a result of their filing a series of baseless pleadings against Trustee Carroll and his counsel, Fox Rothschild LLP ("Fox Rothschild"); and the Court having determined that adequate notice of the Motion has been given; and the Court having read and considered the Motion, as well as any objections to the Motion, and arguments of any counsel appearing regarding the relief requested in the Motion at a hearing before the Court; and the Court having determined that the legal and factual bases set forth in the Motion and at a hearing establish just cause for the relief granted herein;

It is hereby **ORDERED** THAT:

1. The Motion is **GRANTED**; the alleged "lack of candor" of a Fox Rothschild attorney was no such thing. The statement was a mistake, promptly corrected, and the matter could have been resolved without this suit by a simple phone call between counsel and the subsequent corrected statement to the Court. The dismissal "without prejudice" is immaterial; the litigation against Fox Rothschild should never have been initiated;

2. Norman A. Abood, Esquire; Robert F. Craig Esquire; and Lawrence Schoenbach, Esquire have unreasonably and vexatiously multiplied proceedings in bad faith, constituting violation of 28 U.S.C. § 1927 by filing against Trustee Carroll and Fox Rothschild the Complaint (10-03001, Adv. Doc. No. 1); the Motion for Waiver of Conflicts Hearing (10-03001, Adv. Doc. No. 2); Debtor's Objection to the Chapter 7 Trustee's Ninth Quarterly Fee Application (06-30009, Doc. No. 2694); and Debtor's Objection to Fox Rothschild LLP's Eighth Quarterly Fee Application (06-30009, Doc. No. 2695);

3. Norman A. Abood, Esquire; Robert F. Craig, Esquire; and Lawrence Schoenbach, Esquire, jointly and severally, are responsible for paying all costs and expenses incurred by the Chapter 7 estate in connection with the Complaint (10-03001, Adv. Doc. No. 1); the Motion for Waiver of Conflicts Hearing (10-03001, Adv. Doc. No. 2); Debtor's Objection to the Chapter 7 Trustee's Ninth

Quarterly Fee Application (06-30009, Doc. No. 2694); and Debtor's Objection to Fox Rothschild LLP's Eighth Quarterly Fee Application (06-30009, Doc. No. 2695);

4. Trustee Carroll is directed to submit a bill of costs and expenses, including all attorneys' fees and expenses incurred in the Complaint (10-03001, Adv. Doc. No. 1); the Motion for Waiver of Conflicts Hearing (10-03001, Adv. Doc. No. 2); Debtor's Objection to the Chapter 7 Trustee's Ninth Quarterly Fee Application (06-30009, Doc. No. 2694); and Debtor's Objection to Fox Rothschild LLP's Eighth Quarterly Fee Application (06-30009, Doc. No. 2695), within seven (7) days of the date hereof;

5. Norman A. Abood, Esquire; Robert F. Craig, Esquire; and Lawrence Schoenbach, Esquire, may file objections to such bill of costs with seven (7) days of service thereon; and

6. Thereafter, the Court shall issue an Order specifying the amount of fees and costs to be paid to the Chapter 7 estate by Norman A. Abood, Esquire; Robert F. Craig, Esquire; and Lawrence Schoenbach, Esquire.

7. Counsel for the Chapter 7 Trustee shall immediately serve a copy of this Order on all parties in interest who do not receive electronic notice and shall file a certificate of service forthwith.

Dated: August 17, 2010

/s/ JUDITH K. FITZGERALD
Judith K. Fitzgerald **kdv**
United States Bankruptcy Judge

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
BANKRUPTCY DIVISION

Case No. 06-30009 (JKF) Chapter 7

Related to Doc. No. 2788

IN RE:

JEFFREY J. PROSSER,

Debtor.

Adv. Proc. No. 10-03001

Related to Doc. Nos. 143, 158, 272, 274, 276, 284, 303, 305, 307, 310

JEFFREY J. PROSSER,

MOVANT,

v.

TOBY GERBER, FULBRIGHT & JAWORSKI, L.L.P., JAMES J. LEE, VINSON & ELKINS, L.L.P., STAN SPRINGEL, CHAPTER 11 TRUSTEE OF INNOVATIVE COMMUNICATION CORPORATION AND INNOVATIVE COMMUNICATION COMPANY, LLC AND EMERGING COMMUNICATIONS, INC., JAMES P. CARROLL, CHAPTER 7 TRUSTEE OF THE ESTATE OF JEFFREY J. PROSSER, FOX ROTHSCHILD, L.L.P.,

GENOVESE, JOBLOVE & BATTISTA, P.A., PAUL BATTISTA, THERESA VAN VILET, AND ALVAREZ & MARSAL, LLC,

RESPONDENTS.

ORDER AWARDING LEGAL FEES AND EXPENSES PURSUANT TO THE CHAPTER 7 TRUSTEE'S MOTION FOR LEGAL FEES AND EXPENSES AGAINST NORMAN A. ABOOD, ESQ., ROBERT F. CRAIG, ESQ. AND LAWRENCE H. SCHOENBACH, ESQ. PURSUANT TO 28 U.S.C. § 1927

AND NOW, this **9th** day of **December**, **2011**, **WHEREAS** the Chapter 7 Trustee filed his Motion for Legal Fees and Expenses Against Norman A. Abood, Esq., Robert F. Craig, Esq. and Lawrence H. Schoenbach, Esq. Pursuant to 28 U.S.C. § 1927 (hereinafter "Motion"), Adv. Doc. No. 143; and

WHEREAS the Motion was granted by the Order dated August 17, 2010 (hereinafter the "August Order"), Adv. Doc. No. 272; and

WHEREAS the August Order directed the Chapter 7 Trustee to submit a bill of costs and expenses, including all attorneys' fees and expenses incurred in the Complaint (10-03001, Adv. Doc. No. 1); the Motion for Waiver of Conflicts Hearing (10-03001, Adv. Doc. No. 2); Debtor's Objection to the Chapter 7 Trustee's Ninth Quarterly Fee Application (06-30009, Doc. No. 2694); and Debtor's Objection

to Fox Rothschild LLP's Eighth Quarterly Fee Application (06-30009, Doc. No. 2695), within seven days of entry of the Order; and

WHEREAS the Chapter 7 Trustee filed a Certification of Counsel Regarding his Bill of Costs and Expenses, Adv. Doc. No. 274, seeking $196,033.02 in fees and expenses, attached to which, as Exhibit A, were billing reports in which the claimed fees and costs incurred were bracketed for the Court's review; and

WHEREAS Robert F. Craig, Esq., Lawrence H. Schoenbach, Esq., and Norman A. Abood, Esq. (collectively "Respondents") filed their Objection to, and Motion to Strike, Trustee Carroll's Bill of Costs and Expenses, Adv. Doc. No. 276[1] and the Chapter

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[1] Respondents filed the following in response to the Court's August 17, 2010 Order: (1) Objections to the Bankruptcy Court's "Order Granting Trustee Carroll's Motion for Legal Fees and Expenses Against Norman A. Abood, Esq., Robert F. Craig, Esq., and Lawrence H. Schoenbach, Esq. Pursuant to 28 U.S.C. § 1927"; Request for Oral Argument, (hereinafter "Objections to Order") Adv. Doc. No. 277, (2) Motion for Leave to Appeal, Adv. Doc. No. 278, (3) Notice of Appeal, Adv. Doc. No. 279, and (4) Objection to, and Motion to Strike, Trustee Carroll's Bill of Costs and Expenses on August 31, 2010, at Adv. Doc. No. 276. Despite the fact that this is a core matter and that the Court issued an interim order, not a report and recommendation, Respondents filed their Objections to Order pursuant to Fed. R. Bankr. P. 9033, which applies when a bankruptcy judge files proposed findings of fact and conclusions of law in non-core proceedings. Rule 9033 provides for a transcription of the record for district court review upon objections to the bankruptcy court's proposed findings of fact and conclusions of law, and there-

7 Trustee filed his Reply in Opposition thereto, Adv. Doc. No. 284; and

WHEREAS a hearing was held on October 20, 2010, to determine the appropriate amount of fees and costs to be awarded; and

WHEREAS, upon review of Exhibit A to Adv. Doc. No. 274, the Court found that certain billing items required additional information in order for the Court to determine whether an award of the associated fees and costs was appropriate. Accordingly, the Court ordered the Chapter 7 Trustee to provide additional information with respect to various line items, which were attached in list form to said Order, Adv. Doc. No. 303; and

WHEREAS, in response to the Court's Order at Adv. Doc. No. 303, the Chapter 7 Trustee filed the supplemental information requested by the Court in the form of a document titled, "Trustee Carroll's Supplement to His Bill of Costs and Expenses" (hereinafter, the "Supplement"), Adv. Doc. No. 305; and

WHEREAS, in response to the Supplement, Jeffrey J. Prosser filed a "Motion for Evidentiary Hearing Regarding Trustee Carroll's Supplement to His Bill of Costs and Expenses in Support of a Sanctions

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fore the Court ordered the Clerk to transmit the Objections to Order to the District Court. *See* Adv. Doc. No. 290. The District Court found that the matter was not appealable because this Court had not yet awarded any specified fees or costs, and thus dismissed the matter to be returned to this Court for further action. *See* 3:10-cv-00099, Doc. No. 28.

Order Imposed By This Court Against Attorneys Lawrence H. Schoenbach, Esquire, Robert F. Craig, Esquire, and Norman A. Abood, Esquire," Adv. Doc. No. 307; and

WHEREAS, the Chapter 7 Trustee and Fox Rothschild, LLP filed an Objection to the above-referenced Motion for Evidentiary Hearing, Adv. Doc. No. 310; and

WHEREAS, argument on the Motion for Evidentiary Hearing regarding the Supplement was heard at the Omnibus Hearing on April 26, 2011; and

WHEREAS, the court having considered all of the arguments both at the hearing and in the pleadings, the Court finds that an evidentiary hearing regarding the fees and expenses to be awarded to the Chapter 7 Trustee is unwarranted, and therefore the Motion for Evidentiary Hearing is **DENIED;** and

WHEREAS, the Court having reviewed the Supplement and finding the Supplement provided sufficient information for the Court to make a determination as to each fee and expense listed by the Chapter 7 Trustee, the Court hereby **AWARDS**, in part[2], the fees and expenses requested by the Chapter 7 Trustee in the amount of **$137,024.02**.

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[2] After review of both the Chapter 7 Trustee's Bill of Costs and Expenses, Adv. Doc. No. 274, Exhibit A, and the Supplement, Adv. Doc. No. 305, the Court has excluded various line items bracketed on the Bill of Costs and Expenses from the total amount claimed by the Chapter 7 Trustee as

It is hereby **ORDERED** that Lawrence H. Schoenbach, Esq., Robert F. Craig, Esq., and Norman A. Abood, jointly and severally, shall pay **$137,024.02** to the Chapter 7 Trustee within thirty (30) days of the entry of this Order.

It is **FURTHER ORDERED** that in the event that either or all of the Respondents contend that they lack an ability to pay this award, the attorneys so contending shall file a motion seeking relief from this Order accompanied by an affidavit (to be filed under seal but served, subject to confidentiality, on the Chapter 7 Trustee and his counsel) concerning an inability to pay, within ten (10) days hereof. If such a motion is filed, the Court will schedule it by separate order.

It is **FURTHER ORDERED** that Counsel for the Chapter 7 Trustee shall immediately serve a copy of this Order on all parties in interest who do not receive electronic notice and shall file a certificate of service forthwith.

Dated December 9, 2011

/s/ JUDITH K. FITZGERALD
Judith K. Fitzgerald fjg
United States Bankruptcy Judge

being outside the scope of the award. A list of all bracketed line items so excluded can be found beginning on page 5 of this Order, including the Court's reason for each excluded line item.

**CHART OF FEES AWARDED,
CITED ON FOOTNOTE 2, PAGE 4 IS
NOT INCLUDED DUE TO
RESIZING CONSTRAINTS.**

**THE CHART IS AVAILABLE
UPON REQUEST.**