

No. 17-1456

IN THE
Supreme Court of the United States

MICHAEL T. KENNEDY,

Petitioner,

v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ET
AL.,

Respondents.

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

BRIEF IN OPPOSITION

M. KELLY TILLERY
Counsel of Record
PEPPER HAMILTON LLP
3000 TWO LOGAN SQUARE
EIGHTEENTH & ARCH STREETS
PHILADELPHIA, PA 19103-2799
(215) 981-4000
tilleryk@pepperlaw.com

*Counsel for Skadden
Respondents*

QUESTIONS PRESENTED

1. Whether the Third Circuit's unpublished and non-precedential determination that equitable tolling could not save petitioner's concededly time-barred claims in this case was proper, based on the Bankruptcy Court's specific factual determination that the circumstances relevant to petitioner's claims were known over six years prior to the filing of his complaint, where the relevant factual and legal determinations were limited to the particulars of this case.

2. Whether the Third Circuit appropriately declined to otherwise consider the merits of petitioner's claims under 11 U.S.C. § 327(a), given that the claims were time-barred and because this issue was not properly before the Third Circuit.

CORPORATE DISCLOSURE

Pursuant to this Court's Rule 29.6, respondents Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") and SK Private Investment Fund 1998 LLC state that:

Skadden does not have a parent corporation and there is no publicly held corporation that owns 10% or more of Skadden's stock.

SK Private Investment Fund 1998 LLC does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE.....	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF AUTHORITIES.....	vii
INTRODUCTION.....	1
OPINIONS BELOW	3
JURISDICTION	3
STATEMENT OF THE CASE	6
I. COMMENCEMENT OF THE CHAPTER 11 CASES AND SKADDEN’S REPRESENTATION OF RADNOR IN THE BANKRUPTCY PROCEEDINGS	6
A. The Bankruptcy Court Grants Skadden’s Retention Application	7
B. The Bankruptcy Court Approves the Sale of Radnor’s Assets	8
C. The Bankruptcy Court Confirms Radnor’s Liquidating Plan	8

II.	THE BANKRUPTCY COURT OVERRULES PETITIONER'S OBJECTION TO SKADDEN'S FEES AND ENTERS THE FINAL FEE ORDER.....	9
III.	PETITIONER'S PRIOR APPEAL FROM THE FINAL FEE ORDER	11
	A. The District Court and Third Circuit Affirm the Final Fee Order	11
	B. The Bankruptcy Court Denies Petitioner's Second Motion to Vacate.....	13
	C. This Court Denies Certiorari	13
IV.	DISMISSAL OF PETITIONER'S ADVERSARY COMPLAINT	14
	A. The Bankruptcy Court Dismisses the Complaint	14
	B. The District Court Affirms Dismissal of Complaint.....	16
	C. The Third Circuit Affirms	17
	D. The Petition For Certiorari	17
	REASONS FOR DENYING THE PETITION.....	18
I.	PETITIONER'S FIRST, THIRD, AND FOURTH QUESTIONS DO NOT PROVIDE A BASIS FOR REVIEW	18

A.	The Petition Rests On Putative Facts Disproven By The Lower Courts' Factual Findings	18
B.	There Is No Intra- or Inter-Circuit Conflict Regarding Federal Equitable Tolling That Would Alter The Outcome Of This Case.....	20
C.	Resolution Of The First, Third, And Fourth Questions Presented Is Barred By <i>Res Judicata</i> , Collateral Estoppel, And Waiver.....	23
II.	PETITIONER'S SECOND QUESTION PRESENTED DOES NOT PROVIDE A BASIS FOR REVIEW	25
A.	The Application Of 11 U.S.C. § 327(a) Was Not Passed Upon Below	26
B.	There Is No Intra- or Inter-Circuit Conflict Regarding 11 U.S.C. § 327(a) That Would Alter The Outcome Of This Case.....	26
C.	Resolution Of The Second Question Presented Is Barred By <i>Res Judicata</i> , Collateral Estoppel, And Waiver	29
	CONCLUSION	30

TABLE OF APPENDICES

APPENDIX A — Denial of Petition for Writ of Certiorari, <i>Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP</i> , 137 S. Ct. 294 (2016)	1a
APPENDIX B — Third Circuit Affirmance of Final Fee Order, <i>In re Radnor Holdings Corp.</i> , 629 F. App'x 277 (3d Cir. 2015).....	2a
APPENDIX C — District Court Affirmance of Final Fee Order, <i>Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP (In re Radnor Holdings Corp.)</i> , 528 B.R. 245 (D. Del. 2014)	7a
APPENDIX D — Final Fee Order, <i>In re Radnor Holdings Corp.</i> , Case No. 06- 10894, 2013 WL 3228116 (Bankr. D. Del. June 20, 2013)	19a
APPENDIX E — Memorandum Order Denying Second Motion to Vacate, <i>In re Radnor Holdings Corp.</i> , Case No. 06- 10894 (Bankr. D. Del. Mar. 18, 2015), ECF 2151	51a

TABLE OF AUTHORITIES

CASES

<i>Adarand Constructors, Inc. v. Mineta</i> , 534 U.S. 103 (2001).....	26
<i>Bowles v. Russel</i> , 551 U.S. 205 (2007).....	5
<i>Byrd v. United States</i> , 138 S. Ct. 1518 (2018)	26
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	26
<i>Davis v. United States</i> , 417 U.S. 333 (1974).....	20
<i>In re Federated Department Stores, Inc.</i> , 44 F.3d 1310 (6th Cir. 1995)	27, 28
<i>Graver Tank & Manufacturing Co. v. Linde</i> <i>Air Products, Co.</i> , 336 U.S. 271 (1949)	20
<i>Kennedy v. Skadden, Arps, Slate, Meagher &</i> <i>Flom LLP (In re Radnor Holdings</i> <i>Corp.)</i> , Case No. 06-10894 (KG), Adv. No. 12-51308 (KG), 2016 WL 1644499 (Bankr. D. Del. Apr. 22, 2016).....	3
<i>Kennedy v. Skadden Arps, Slate, Meagher &</i> <i>Flom LLP (In re Radnor Holdings</i> <i>Corp.)</i> , 564 B.R. 467 (D. Del.)	3
<i>Kennedy v. Skadden, Arps, Slate, Meagher &</i> <i>Flom LLP</i> , 137 S. Ct. 294 (2016).....	6, 13, 27

<i>Leavitt v. Jane L.</i> , 518 U.S. 137 (1996).....	25
<i>In re Milby</i> , 875 F.3d 1229 (9th Cir. 2017)	20, 21, 22
<i>Official Comm. of Unsecured Creditors v.</i> <i>Tennenbaum Capital Partners LLC</i> <i>(In re Radnor Holdings Corp.)</i> , 353 B.R. 820 (Bankr. D. Del. 2006).....	8
<i>In re Radnor Holdings Corp.</i> , 706 F. App'x 94 (3d Cir. 2017).....	3
<i>Sommerville v. United States</i> , 376 U.S. 909 (1964).....	29
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002)	25, 29
<i>Texas v. Mead</i> , 465 U.S. 1041 (1984).....	19
<i>United States ex. rel. Darcy v. Handy</i> , 351 U.S. 454 (1956).....	20
<i>United States v. Johnston</i> , 268 U.S. 220 (1925)	20
<i>United States v. Stauffer Chemical Co.</i> , 464 U.S. 165 (1984).....	24, 29
<i>United States v. Tohono O'Odham Nation</i> , 563 U.S. 307 (2011).....	24, 29

<i>U.S. Bank National Association ex rel. CWC Capital Asset Management LLC v. Village at Lakeridge LLC, 138 S. Ct. 960 (2018)</i>	<i>23</i>
<i>U.S. Trustee v. Price Waterhouse, 19 F.3d 138 (3d Cir. 1994)</i>	<i>28</i>
<i>Wisniewski v. United States, 353 U.S. 901 (1957)</i>	<i>20</i>
<u>Statutes</u>	
11 U.S.C. § 327	29, 30
11 U.S.C. § 327(a)	<i>Passim</i>
28 U.S.C. § 151	4
28 U.S.C. § 157	4
28 U.S.C. § 158(d)	4
28 U.S.C. § 1334	4
28 U.S.C. § 1254	4
28 U.S.C. § 1291	4
28 U.S.C. § 2101(c)	5
<u>Other Authorities</u>	
STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE (10th ed. 2013)	29

INTRODUCTION

The Petition is the latest litigation commenced by serial litigant Michael T. Kennedy (“Petitioner” or “Kennedy”). Petitioner is the disgruntled former CEO, chairman of the board and shareholder of the Debtors (as defined below) who has been embroiled in litigation over Debtors’ bankruptcy for nearly a decade. Petitioner was recently sanctioned by the Bankruptcy Court for “litigat[ing] beyond reason” and for his false allegations concerning Respondents, including Skadden and Tennenbaum Capital Partners, LLC (“Tennenbaum”).¹ Pet. App. at 62a-64a.²

The petition for writ of certiorari (the “Petition”) should be denied by this Court, just as the Court denied a petition by Petitioner raising nearly identical claims only two years ago. *See* Opp’n App. at 1a. Like Petitioner’s prior filings, the Petition is filled with false and exaggerated factual allegations

¹ This Brief in Opposition is filed on behalf of Skadden, Skadden Arps SK Private Investment Fund 1998, Richard T. Prins, and Gregory M. Galardi (collectively, the “Skadden Respondents”).

² References to documents in the bankruptcy case, Case No. 06-10894 (KG) (Bankr. D. Del.), will be cited as “B.D.I.,” those in the adversary proceeding, Adv. No. 12-51308 (KG), will be cited as “A.P.D.I.,” those in the appeal to the District Court, Case No. 16-332 (RGA) (D. Del.), will be cited as “D.I.,” and those in the appeal to the Third Circuit, Case No. 17-1415 (3d Cir.), will be cited as “T.D.I.” The Petition for a Writ of Certiorari and the Appendix to the Petition for a Writ of Certiorari, docketed April 16, 2018, are cited “Pet. at ___” and “Pet. App. at ___,” respectively. Skadden’s appendix, submitted contemporaneously herewith, is cited as Opp’n App. at ___.”

and misstatements of law. The Skadden Respondents respectfully submit that the Petition should be denied for several reasons.

First, each question presented by the Petition (collectively, the “Questions Presented”) asks this Court to review case-specific factual determinations made by the courts below rather than questions of law. Indeed, the Petition is predicated entirely upon factual allegations that are false and which were previously rejected by the Bankruptcy Court, District Court, and Third Circuit in this and prior litigation. Petitioner also argues that his claims should be equitably tolled and that Skadden was not disinterested under 11 U.S.C. § 327(a) because the courts below failed to consider material evidence. However, as noted by the Third Circuit and District Court, all such alleged “new evidence” previously was disclosed by Skadden and considered and ruled upon by the Bankruptcy Court and then the appellate courts in the last round of appeals. This Court is not the proper forum for second-guessing the factual findings of the Bankruptcy Court, which is, in essence, all that Petitioner requests.

Second, the Petition does not allege any genuine inter- or intra-circuit split. Petitioner’s attempts to manufacture alleged circuit splits fail where, as here, Petitioner’s arguments hinge upon an adoption of factual findings which are contradicted by findings in prior judicial proceedings and appeals.

Finally, this Petition is a poor vehicle for review of the Questions Presented because review of those questions is barred by *res judicata*, collateral

estoppel, and waiver. The Petition should be denied because it seeks to re-litigate several matters that were finally adjudicated against Petitioner in prior litigation, including matters not properly preserved below. As such, it is not clear that the Court would or could ultimately reach the Questions Presented by the Petition. And, in any event, review of the Petition would not change the outcome below.

For these reasons and those stated more fully below, the Petition should be denied.

OPINIONS BELOW

The Bankruptcy Court's opinion and order dismissing Petitioner's adversary proceeding complaint is not officially reported, but is available on Westlaw. *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP (In re Radnor Holdings Corp.)*, Case No. 06-10894 (KG), Adv. No. 12-51308 (KG), 2016 WL 1644499 (Bankr. D. Del. Apr. 22, 2016) (the "Dismissal Order"). The District Court's opinion and order affirming the Dismissal Order is reported in the Bankruptcy Reporter. *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP (In re Radnor Holdings Corp.)*, 564 B.R. 467 (D. Del. 2017). The non-precedential opinion of the Third Circuit affirming the Dismissal Order is not officially reported but is included in the Federal Appendix. *In re Radnor Holdings Corp.*, 706 F. App'x 94 (3d Cir. 2017).

JURISDICTION

On December 26, 2012, Petitioner filed a complaint [A.P.D.I. 1] with the United States

Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”), commencing an adversary proceeding (the “Adversary Proceeding”) in the Chapter 11 case of Radnor Holdings Corporation (the “Debtors” or “Radnor”). On February 26, 2013, Petitioner filed an amended complaint [A.P.D.I. 6] (the “Complaint”). The Complaint was dismissed on April 22, 2016. *See* Pet. App. at 50a-62a. On February 9, 2017, the United States District Court for the District of Delaware (the “District Court”) affirmed on all grounds [D.I. 19]. Pet. App. at 10a-45a. On November 30, 2017, the United States Court of Appeals for the Third Circuit (the “Third Circuit”) affirmed the Bankruptcy Court’s dismissal of the Complaint as time-barred without reaching numerous other grounds for dismissal [T.D.I. 003112790725]. Pet. App. at 6a-8a. On January 16, 2018, the Third Circuit denied rehearing [T.D.I. 003112826103]. On April 23, 2018, Petitioner filed the Petition.

The Bankruptcy Court, as a unit of the District Court pursuant to 28 U.S.C. § 151, had subject matter jurisdiction to enter the Dismissal Order pursuant to 28 U.S.C. §§ 157 and 1334. The District Court had jurisdiction under 28 U.S.C. §§ 158 and 1334, and the Third Circuit had jurisdiction under 28 U.S.C. §§ 158(d) and 1291. This Court has jurisdiction to review the Third Circuit’s judgment under 28 U.S.C. § 1254(1).

To the extent that Petitioner seeks review of orders or judgments issued prior to the Dismissal Order, Skadden respectfully submits that this Court lacks jurisdiction over those judgments. For example, much of the Petition seeks to challenge: (i)

the Retention Order (as defined below) authorizing the retention of Skadden as counsel to the Debtors in their Chapter 11 cases; (ii) the Sale Order (as defined below) authorizing the bankruptcy sale of Radnor's assets; (iii) the Confirmation Order (as defined below) confirming the Debtors' plan of liquidation; (iv) the Bankruptcy Court's opinion denying Petitioner's First Motion to Vacate (as defined below) seeking relief from the Sale Order and the Confirmation Order; and (v) the Bankruptcy Court's opinion denying Petitioner's Second Motion to Vacate (as defined below) again seeking to revisit the Sale Order and Confirmation Order. These matters were never appealed and were never subject to a timely petition for certiorari. As a result, this Court lacks jurisdiction to review those prior orders and judgments. *See, e.g.*, 28 U.S.C. § 2101(c) (a petition for certiorari "shall be taken or applied for within ninety days after the entry of . . . judgment" but a Justice "may extend the time for applying for a writ of certiorari for a period not exceeding sixty days"); *Bowles v. Russel*, 551 U.S. 205, 214-15 (2007) (appellate court lacked jurisdiction over matters not timely appealed).

Likewise, the District Court and the Third Circuit have affirmed the decision and order of the Bankruptcy Court approving Skadden's final fee application in the Debtors' Chapter 11 cases (the "Final Fee Order"). The Final Fee Order has been fully and finally adjudicated in prior, separate proceedings and is not before this Court.

STATEMENT OF THE CASE

This is Petitioner’s second petition for certiorari to this Court that seeks to challenge the same issues that were finally and conclusively decided by the Final Fee Order on June 20, 2013. As the Third Circuit recognized below, Petitioner’s original “appeal of the Final Fee Order raised very similar, if not identical, claims as those raised in this appeal, including that Skadden attorneys concealed their investments in the Tennenbaum-affiliated Special Value Expansion Fund, LLC.” Pet. App. at 8a n.2.³ This Court denied a petition for certiorari regarding the Final Fee Order in 2016. It should do the same here.

I. COMMENCEMENT OF THE CHAPTER 11 CASES AND SKADDEN’S REPRESENTATION OF RADNOR IN THE BANKRUPTCY PROCEEDINGS

On August 21, 2006, Radnor Holdings Corporation and its affiliated debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Pet. App. at 3a.

³ Skadden denies all of Petitioner’s false factual assertions and allegations in the Petition that are contradicted by the record of the Radnor Chapter 11 cases and the Bankruptcy Court’s lengthy and well-reasoned findings of fact in the Final Fee Order. Additional discussion of those false factual assertions and allegations can be found in Skadden’s Brief in Opposition to Petitioner’s prior petition for certiorari. See Skadden Brief in Opposition at 6-18, *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP*, 137 S. Ct. 294 (2016) (No. 15-1413).

A. The Bankruptcy Court Grants Skadden's Retention Application

On August 25, 2006, the Debtors applied to the Bankruptcy Court (the "Skadden Retention Application") for an order authorizing the Debtors to retain Skadden as their bankruptcy counsel. *Id.* at 12a. In connection with its retention, Skadden submitted several declarations disclosing its prior relationship with Tennenbaum. *Id.* at 13a. In response to an objection by the United States Trustee (the "UST") to the Skadden Retention Application, Skadden provided further disclosures and testimony at an evidentiary hearing on the UST's objection that further clarified any connections Skadden had with Tennenbaum (collectively, the "Pre-Retention Disclosures"). *Id.* The Pre-Retention Disclosures explained, among other things, that certain Skadden partners had investments in Tennenbaum-affiliated funds. *Id.* Each of the Pre-Retention Disclosures was presented openly to the Bankruptcy Court, and all parties were given the opportunity to object to the retention of Skadden. *Id.*

After considering the record at the contested hearing on approval of the Skadden Retention Application, the Bankruptcy Court entered an order approving the Skadden Retention Application (the "Retention Order"). *Id.* at 4a. Radnor's general counsel attended the hearings on the Skadden Retention Application. Opp'n App. at 30a. No appeal was taken from the Retention Order. *See id.* at 5a.

B. The Bankruptcy Court Approves the Sale of Radnor's Assets

The Debtors sought the Bankruptcy Court's approval of a proposed sale of their assets to Tennenbaum. Pet. App. at 4a. The Unsecured Creditors' Committee (the "UCC") commenced litigation opposing the proposed sale. The UCC asserted various claims against Tennenbaum and its affiliates for purported fraud and collusion in the sale process. *Id.* Following an evidentiary hearing on sale matters, at which Petitioner testified in support of the sale, the Bankruptcy Court entered an order dismissing the UCC's complaint (the "Tennenbaum Judgment"). *Id.*⁴ The Bankruptcy Court determined that Tennenbaum acted in good faith and did not engage in any wrongful conduct in connection with the sale. *Id.* The Bankruptcy Court's order approving the sale of the Debtors' assets to Tennenbaum (the "Sale Order") was not appealed. Pet. App. at 16a.

C. The Bankruptcy Court Confirms Radnor's Liquidating Plan

At a March 15, 2012 initial hearing on confirmation of the Debtors' Chapter 11 plan of liquidation (the "Plan"), Petitioner's then-counsel requested an adjournment of the hearing and an extension of Petitioner's deadline to object to confirmation of the Plan. *See* Pet. App. at 17a. The Bankruptcy Court granted Petitioner's request for

⁴ *See also Official Comm. of Unsecured Creditors v. Tennenbaum Capital Partners LLC (In re Radnor Holdings Corp.)*, 353 B.R. 820, 831 (Bankr. D. Del. 2006).

more time to address matters that Petitioner had allegedly “uncovered.” *Id.* Despite having four extra months, Petitioner did not object to confirmation of the Plan. *Id.* at 18a. On September 10, 2012, after denying Petitioner’s second motion to extend the objection deadline, the Bankruptcy Court confirmed the Plan (the “Confirmation Order”). *Id.* Petitioner did not appeal the Confirmation Order. Pet. at 12.

II. THE BANKRUPTCY COURT OVERRULES PETITIONER’S OBJECTION TO SKADDEN’S FEES AND ENTERS THE FINAL FEE ORDER

Following confirmation of the Plan, Skadden applied to the Bankruptcy Court for approval and payment of Skadden’s fees incurred during the Chapter 11 cases (the “Final Fee Application”). Pet. App. at 19a. Petitioner filed a Motion-Objection in response to the Final Fee Application, both objecting to Skadden’s requested fees (the “Objection”) and asking the Bankruptcy Court to vacate the Sale Order (the “First Motion to Vacate”). *Id.* Simultaneously, the Petitioner filed the Complaint that is the subject of the current Petition. *Id.* at 20a. The Bankruptcy Court dismissed and overruled the First Motion to Vacate the Sale Order as time-barred. *Id.*

In response to Petitioner’s Objection to Skadden’s Final Fee Application, Skadden filed a supplemental disclosure [B.D.I. 2016] regarding *de minimis* interests certain Skadden partners and their spouses, in their individual and personal capacities, previously held in Tennenbaum funds, including \$19,500 in shares of Special Value Expansion Fund,

LLC (“SVEF”) (the “March 2013 Disclosure”). At a May 2013 two-day evidentiary hearing on the Final Fee Application, Skadden adduced testimony that further explained the Skadden partners’ investments in Tennenbaum (together with the March 2013 Disclosure, the “2013 Disclosures”).⁵ *Id.* at 20a, 31a. Petitioner – then represented by counsel – introduced the March 2013 Disclosure and other materials into evidence, cross-examined witnesses, and testified himself at the evidentiary hearing. *See id.* at 20a.⁶

After considering all of the evidence adduced at the hearing, including the 2013 Disclosures and post-trial briefing of both parties, the Bankruptcy Court entered the Final Fee Order approving Skadden’s Final Fee Application. *See Opp’n App.* at 50a.

⁵ Petitioner mischaracterizes the record throughout the Petition by falsely stating that the \$19,500 in shares of SVEF previously held by certain Skadden partners or their spouses, in their individual and personal capacities, establishes that Skadden “owned” SVEF. *See, e.g.,* Pet. at 15, 25. This allegation – including Petitioner’s unverified share ownership calculations made for the first time in the Petition, based upon uncited documents and information outside of, and entirely unsupported by, the record – is not true and multiple courts previously have rejected Petitioner’s similar allegations. *See* Pet. at 15; *see also* Opp’n App. 49a (“At all times during these Chapter 11 cases . . . Skadden . . . did not hold or represent an interest adverse to the Debtors’ estates.”)

⁶ *See also* May 1, 2013 Hr’g Tr. [B.D.I. 2053] at 127:13-129:10 (discussing the March 2013 Disclosure marked as Petitioner’s Exhibit H at the hearing); May 2, 2013 Hr’g Tr. [B.D.I. 2063] at 54:4-10, 58:13-14 (admitting the March 2013 Disclosure into evidence as Petitioner’s Exhibit H).

The Final Fee Order made findings of fact and conclusions of law that are preclusive to the issues raised in the present Petition. The Final Fee Order “determined that the claims and allegations of misconduct by Skadden asserted in the Complaint and Objection were without basis in fact and lacked legal foundation.” Pet. App. at 20a-21a. The Bankruptcy Court found a lack of collusion between Tennenbaum and Skadden. *Id.* at 21a-22a, 53a-54a; Opp’n App. at 29a-30a, 44a. It further found that Skadden acted in good faith and made adequate disclosures, and that Skadden and Tennenbaum did not conceal conflicts of interest. Pet. App. at 53a-54a; Opp’n App. at 44a, 49a-50a.

Moreover, the Bankruptcy Court concluded that Petitioner knew of Skadden’s relationship with Tennenbaum in 2006 – more than six years prior to his challenge to the Final Fee Application – and that Petitioner’s testimony that he did not know about Skadden’s relationship with Tennenbaum lacked credibility. Pet. App. at 21a-22a, 53a-54a; Opp’n App. at 30a, 34a-36a. In addition, the Bankruptcy Court found in the Final Fee Order that Skadden “did not hold or represent an interest adverse to Debtors’ estates and was disinterested within the meaning of 11 U.S.C. § 327(a).” Opp’n App. at 49a.

III. PETITIONER’S PRIOR APPEAL FROM THE FINAL FEE ORDER

A. The District Court and Third Circuit Affirm the Final Fee Order

On August 7, 2013, Petitioner filed a notice of appeal in the District Court from the Bankruptcy

Court's Final Fee Order (the "Final Fee Appeal"). Pet. App. at 5a. Petitioner asserted that the Bankruptcy Court erred in making findings of fact and conclusions of law on the adequacy of Skadden's disclosures concerning connections to Tennenbaum and its affiliates, including, specifically:

[W]hether the bankruptcy court committed error in granting Skadden's final fee application despite Skadden's failure as counsel to debtors to accurately and fully disclose direct investments by Skadden partners in the senior secured creditors to debtor, Tennenbaum funds, controlled affiliates of Tennenbaum Capital Partners, LLC [i.e., SVEF]; [and]

[W]hether the bankruptcy court committed error in granting Skadden's final fee application despite refusing to require Skadden to disclose the dollar amount of attorney's fees paid by Tennenbaum to Skadden as well as the amounts and character of the equity investments by Skadden partners in Tennenbaum funds.

Opp'n App. at 10a-11a.

On August 13, 2014, the District Court affirmed the Bankruptcy Court, finding no error in the Bankruptcy Court's findings of fact. *See* Opp'n App. at 17a-18a. Petitioner appealed to the Third Circuit. Pet. App. at 5a. Petitioner's arguments, including that Skadden did not make adequate disclosures and was not disinterested under 11 U.S.C. § 327(a), were

rejected by the Third Circuit. *See* Opp’n App. at 5a-6a. Petitioner’s motion for rehearing by the Third Circuit was denied. *See* Order Denying Petition for Rehearing, *In re Radnor Holdings Corp.*, No. 14-3794 (3d Cir. Jan. 8, 2016), ECF No. 003112173936.

**B. The Bankruptcy Court Denies
Petitioner’s Second Motion to Vacate**

While Petitioner’s appeal of the Final Fee Order was pending before the Third Circuit, Petitioner filed his second motion to vacate the Sale Order (the “Second Motion to Vacate”). Pet. App. at 23a. The Third Circuit appeal was stayed pending the Second Motion to Vacate. *Id.* On March 18, 2015, the Honorable Kevin Gross—newly assigned to the Radnor Chapter 11 cases—determined that the Second Motion to Vacate was simply an attempt by Petitioner to “tak[e] a ‘run’ at a newly assigned Judge,” and denied the motion as precluded by the previous findings of the Bankruptcy Court. Opp’n App. at 54a, 63a-64a.

C. This Court Denies Certiorari

On May 9, 2016, Petitioner filed a petition for writ of certiorari regarding the Final Fee Order, arguing that Skadden “conceal[ed] adverse conflicts [and] thus lacks the required disinterestedness under 11 U.S.C. § 327(a)” and that Skadden’s alleged conduct justified equitable tolling of the time to object to the Retention Order and “subsequent orders,” to include the Confirmation Order. Petition for Writ of Certiorari at 8, 34-35, *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP*, 137 S. Ct. 294 (2016) (No. 15-1413). On October 11, 2016,

this Court denied the petition for a writ of certiorari. Opp'n App. at 1a.

IV. DISMISSAL OF PETITIONER'S ADVERSARY COMPLAINT

On February 12, 2016, while Petitioner's prior petition for a writ of certiorari seeking this Court's review of the Final Fee Order was pending, Respondents filed motions to dismiss Petitioner's Complaint in the Bankruptcy Court. The Complaint asserted substantially the same allegations of misconduct by Skadden and Tennenbaum that had been asserted by Petitioner in his objection to the Final Fee Application. Those allegations had already been rejected after an evidentiary hearing by the Bankruptcy Court, and on appeal by the District Court and Third Circuit. *See* Pet. App. at 24a.

A. The Bankruptcy Court Dismisses the Complaint

The Bankruptcy Court granted the motion to dismiss on several grounds. Pet. App. at 55a.

First, the Bankruptcy Court determined that Petitioner's claims were barred under any potentially applicable statute of limitations because the Complaint was filed more than six years (the longest potentially applicable limitations period) following November 21, 2006, when Petitioner "knew of Skadden's relationship with the Tennenbaum Defendants." *Id.* at 60a.

Second, the Bankruptcy Court refused to revisit the findings of fact in the Final Fee Order that previously had been affirmed on appeal, namely:

- At all times during these Chapter 11 cases (i) Skadden acted in good faith as counsel to Debtors and (ii) did not hold or represent an interest adverse to Debtors' estates and was disinterested within the meaning of 11 U.S.C. § 327(a).
- Skadden's Pre-Retention Disclosures and other disclosures made in connection with Skadden's retention as bankruptcy counsel, including Skadden's disclosures with respect to Tennenbaum, were adequate and sufficient.
- Skadden did not misrepresent its relationship with Tennenbaum to the Bankruptcy Court or the UST.
- Skadden did not engage in malpractice, breach of fiduciary duty, fraud, conspiracy, perjury, obstruction of justice or other willful misconduct in connection with these Chapter 11 cases.
- There was no collusion or conspiracy between Skadden and its affiliates on the one hand, and Tennenbaum or its affiliates on the other in connection with any matter in these Chapter 11 cases.
- Petitioner's allegations and testimony lacked credibility.

See Opp'n App. at 29a-36a, 44a, 49a-50a. The Bankruptcy Court held that these prior findings of fact and the preclusive doctrines of *res judicata*, collateral estoppel and law of the case barred the claims in Petitioner's Complaint. Pet. App. at 60a-62a.

Finally, the Bankruptcy Court determined that Petitioner lacked standing to pursue the claims in the Complaint, which were all derivative in nature. *Id.* at 62a.

In addition to dismissing the Complaint, the Bankruptcy Court sanctioned Petitioner under Federal Rule of Bankruptcy Procedure 9011 (similar to Fed. R. Civ. P. 11) because Petitioner had “litigated beyond reason” and his conduct was “sanctionable.” Pet. App. at 63a-64a.

B. The District Court Affirms Dismissal of Complaint

On February 9, 2017, the District Court affirmed the Dismissal Order, including the findings and conclusions of the Bankruptcy Court. Pet. App. at 45a. In particular, the District Court rejected Petitioner’s request to equitably toll the statutes of limitations applicable to his claims, all of which, as Petitioner conceded, were otherwise time-barred. *Id.* at 29a-30a. The District Court “reviewed the record and [found] no plausible support for Petitioner’s allegations that Defendants concealed . . . conflicts of interest.” *Id.* at 30a. Equitable tolling could not apply, the court ruled, because Petitioner had actual knowledge of the information underlying the purported conflict as of 2006. *Id.* at 32a.

The District Court further affirmed the Bankruptcy Court’s conclusions that Petitioner’s claims were precluded by the Final Fee Order and that Petitioner lacked standing. *Id.* at 33a, 37a.

C. The Third Circuit Affirms

The Third Circuit affirmed the Bankruptcy Court's Dismissal Order based solely on its conclusion that Petitioner's claims were time-barred. Pet. App. at 6a. The Third Circuit agreed that, regardless of which statute of limitations applied, Petitioner's claims were barred "because all of the wrongful acts alleged in [Petitioner]'s Complaint predate or relate to Radnor's sale to Tennenbaum on November 21, 2006." *Id.* Based on those facts, the Third Circuit agreed that the 2013 Disclosures could not form the basis for equitable tolling of the limitations periods. *Id.* at 6a-7a. The court summarized: "Since Tennenbaum's relationship with Skadden, including that certain Skadden partners had invested in Tennenbaum-affiliated Funds, was revealed at the latest by the sale hearing, and thus more than six years before Petitioner filed his Complaint, his claims are time-barred." *Id.* at 8a.

The Third Circuit also held that Petitioner was merely raising the same arguments as those raised on appeal of the Final Fee Order, stating: "[Petitioner]'s appeal of the Final Fee Order raised *very similar, if not identical, claims as those raised in this appeal, including that Skadden attorneys concealed their investments in the Tennenbaum-affiliated Special Value Expansion Fund LLC.*" *Id.* at 8a n.2 (emphasis added).

D. The Petition For Certiorari

On April 23, 2018, Petitioner filed the Petition. The Petition largely reiterates the same allegations that this Court refused to entertain during the Final Fee Appeal.

REASONS FOR DENYING THE PETITION**I. PETITIONER’S FIRST, THIRD, AND
FOURTH QUESTIONS DO NOT
PROVIDE A BASIS FOR REVIEW**

Petitioner’s First, Third, and Fourth Questions Presented—which concern the Third Circuit’s determination that equitable tolling of the relevant statute of limitations was not warranted—do not merit this Court’s review. All three questions are predicated entirely on false (and case-specific) factual assertions and allegations that were considered and rejected by the courts below. Moreover, Petitioner fails to identify any intra- or inter-circuit conflict that would alter the outcome of this case. Even if there were such a conflict, the Petition would be an exceedingly poor vehicle for the review of any purported disagreement among the circuits because Petitioner’s contentions are barred by *res judicata*, collateral estoppel, and waiver.

**A. The Petition Rests On Putative Facts
Disproven By The Lower Courts’ Factual
Findings**

This Court should decline consideration of Petitioner’s First, Third, and Fourth Questions Presented because those questions are based on the false factual allegation that Skadden failed to disclose actual conflicts with Tennenbaum. Those contentions were considered and rejected below on multiple occasions. *See, e.g.*, Pet. App. at 21a-22a; Opp’n App. at 29a-36a, 44a, 49a-50a. The courts below found that Skadden did not withhold information regarding certain partners’ investments

in Tennenbaum. Pet. App. at 21a-22a. And those findings rested, in part, on credibility determinations. *See id.* at 22a; Opp’n App. at 34a-36a. The Petition is nothing more than a request for this Court to undertake case-specific, fact-bound, record-based determinations that do not warrant this Court’s review. Put simply, there is no question of law lurking in the Petition that does not ultimately collapse into a determination of fact. Moreover, the Third Circuit’s conclusion in its unpublished, non-precedential opinion is amply supported by the lengthy record of the Chapter 11 cases, including the Bankruptcy Court’s Dismissal Order and the prior findings in its Final Fee Order.

The March 2013 Disclosure was not “overlooked” by the Bankruptcy Court, Pet. at 26, but rather was squarely before, and ruled upon by, the Bankruptcy Court in the Final Fee Order, which is a final and non-appealable order. *See generally* Opp’n App. at 1a-50a. Moreover, courts in this and prior litigation have repeatedly found that Skadden’s disclosures were adequate and that Petitioner knew of Skadden’s relationship with Tennenbaum more than six years before he filed the Complaint. *See, e.g.*, Pet. App. at 6a-7a; Opp’n App. at 29a-30a.

As the Third Circuit correctly concluded, Petitioner’s appeal was in effect an appeal of the Bankruptcy Court’s factual determination that any purported conflict had been disclosed by the time the Sale Order was issued in November 2006. *See* Pet. App. at 6a-8a & n.2. But Petitioner’s mere disagreement with the Bankruptcy Court’s reasoned and detailed findings does not provide a basis to grant the Petition. *See Texas v. Mead*, 465 U.S.

1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari) (“We do not grant a certiorari to review evidence and discuss specific facts.”) (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Tank & Mfg. Co. v. Linde Air Prods., Co.*, 336 U.S. 271, 275 (1949) (holding that “[a] court of law, such as this Court,” is not “a court for correction of errors in fact finding”); *cf. United States ex. rel. Darcy v. Handy*, 351 U.S. 454, 465 (1956) (refusing to upset lower court findings because “[t]he issue thus raised is largely one of credibility to be determined by the trier of the facts”). In this respect, the Petition suffers from the same defects as Petitioner’s prior attempt to secure review of the Final Fee Order. For the same reasons, this Petition should be rejected.

B. There Is No Intra- or Inter-Circuit Conflict Regarding Federal Equitable Tolling That Would Alter The Outcome Of This Case

Although Petitioner asserts that the Third Circuit’s non-precedential opinion is inconsistent with the Ninth Circuit’s recent decision in *In re Milby*, 875 F.3d 1229 (9th Cir. 2017) and prior Third Circuit equitable tolling law,⁷ Petitioner’s argument fails to establish a genuine conflict. *See generally* Pet. at 25-29. Rather, Petitioner argues here, as he did in his previous appeals of the Final Fee Order,

⁷ Even if an intra-circuit conflict existed – which it does not – “[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties.” *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam); *see also Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of petition for certiorari concerning intra-circuit split).

merely that the courts below “did not construe the evidence in order to reach his desired conclusion.” Opp’n App. at 6a. Petitioner argues that he meets both the Third and Ninth Circuit standards for equitable tolling based on the same false factual predicate: Skadden allegedly concealed conflicts of interest. *See* Pet. at 28-29.

Petitioner’s argument does not establish any split among the circuits. That the Third Circuit reached a different conclusion here than *Milby* based on different evidence and facts is not evidence of a circuit split. The Court should therefore decline to review Petitioner’s First, Third, and Fourth Questions Presented because they fail to identify a circuit split that would have any impact on the resolution of the appeal.

Consistent with the Ninth Circuit’s decision in *Milby*, Petitioner here fails to meet the standard for equitable tolling under federal law. The equitable tolling test in *Milby* requires that the party seeking application of equitable tolling “bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” 875 F.3d at 1232 (citation omitted). The Ninth Circuit in *Milby* was primarily concerned with the first element—namely, diligence. The second element was satisfied in *Milby* because the bankruptcy court had previously held that extraordinary circumstances prevented timely filing where the debtors had committed “egregious conduct, including . . . the failure to schedule assets, false oaths in the schedules and in response to questions at creditors’ meetings, and failure to turn

over documents and cooperate with the trustee.” 875 F.3d at 1232-33 (citation omitted). The bankruptcy court even denied the debtor’s discharge as a discovery sanction. *Id.* at 1233 n.3.

As to the first *Milby* factor, Petitioner was plainly not diligent in this case. The Bankruptcy Court below found that Petitioner had actual knowledge that Skadden partners had investments in Tennenbaum funds no later than November 21, 2006. Pet. App. at 60a; *see also id.* at 31a-32a; *id.* at 7a. Yet Petitioner failed to file his Complaint for over six years.

As to the second *Milby* factor, no extraordinary circumstances exist here, as is evident from the Bankruptcy Court’s factual determinations in the Final Fee Order. Skadden’s disclosures were timely, adequate, and made in good faith. Pet. App. at 53a-54a. Moreover, here, in stark contrast to *Milby*, the Bankruptcy Court held that *Petitioner’s* conduct was “sanctionable” and that he has “litigated beyond reason.” Pet. App. at 63a-64a. Skadden, on the other hand, has been conclusively and finally found to have acted in good faith at all times, and to have adequately disclosed its relationships with Tennenbaum. *See id.* at 21a. Based on the facts of this case as found by the Bankruptcy Court, Petitioner cannot establish the second element for equitable tolling in *Milby*.

Petitioner’s reference to Third Circuit equitable tolling cases is similarly inapposite. *See* Pet. at 28-29 (citing Third Circuit case law). The Third Circuit law cited by Petitioner stands for the proposition that Petitioner had the burden to prove “fraudulent concealment” to obtain equitable tolling. As

discussed above, and as found by multiple courts, Petitioner has failed to do so based on the specific facts of this case. These factual differences create no intra- or inter-circuit split.⁸

C. Resolution Of The First, Third, And Fourth Questions Presented Is Barred By *Res Judicata*, Collateral Estoppel, And Waiver

The Petition is an exceedingly poor vehicle for this Court’s review of any legal question regarding equitable tolling for two additional reasons: As the Bankruptcy Court and District Court correctly held, Petitioner’s claims are barred by *res judicata* and collateral estoppel. In addition, Petitioner waived any argument that federal tolling principles should apply by failing to raise those arguments below.

First, issues involving *res judicata* and collateral estoppel support denial of the Petition. The Petition rests on false allegations that Skadden’s relationship with Tennenbaum and *de minimis* investments by Skadden partners and their spouses in certain Tennenbaum-affiliated funds were not adequately disclosed. *See* Pet. at i-ii, 24-33. Those same issues

⁸ Moreover, Petitioner’s reference to the Court’s recent decision in *U.S. Bank Nat’l Ass’n v. Village at Lakeridge LLC*, 138 S. Ct. 960 (2018), is inapposite. *See* Pet. at 32-33. The primary issue in *Lakeridge* was the standard of review applicable to a mixed question of law and fact – in that instance whether a party was an “insider” of the debtor. *See Lakeridge*, 138 S. Ct. at 963. That is a far cry from the questions raised in the Petition. To the extent it is relevant, *Lakeridge* counsels in favor of deference to the Bankruptcy Court’s factual findings in the Final Fee Order that Skadden adequately disclosed all relevant conflicts.

were thoroughly litigated by the Petitioner in his Objection to Skadden’s Final Fee Application and related appeals of the Final Fee Order. *See, e.g.*, Pet. App. at 8a n.2 (Third Circuit explaining that “[Petitioner]’s appeal of the Final Fee Order raised *very similar, if not identical, claims as those raised in this appeal, including that Skadden attorneys concealed their investments in the Tennenbaum-affiliated Special Value Expansion Fund LLC.*”) (emphasis added).

The issues raised by the Petition are fact-based, case-specific, and tethered to baseless factual and legal allegations barred by the preclusive doctrines of *res judicata* and collateral estoppel. *See* Pet. App. at 32a-36a (District Court’s holding that Petitioner’s claims were barred by issue and claim preclusion). As this Court has recognized, “claim preclusion, or *res judicata*, . . . bars ‘repetitious suits involving the same cause of action’ once ‘a court of competent jurisdiction has entered a final judgment on the merits.’” *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 315 (2011) (citation omitted). Similarly, the Court has “preclude[d] relitigation of the same issue already litigated against the same party in another case involving virtually identical facts” under the doctrine of collateral estoppel. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984). Petitioner’s claims are barred under either preclusive doctrine, as the District Court and Bankruptcy Court correctly held. Because either doctrine would provide an independent ground for affirmance of the judgment below, this case is a poor vehicle for review of the Questions Presented.

Second, Petitioner waived his argument that *federal*, as opposed to state, principles of equitable tolling should apply, because Petitioner argued below only that state statutes of limitations applied to his claims. *See* Pet. App. at 55a-60a (listing Petitioner’s claims and applicable statutes of limitations under various state laws). The District Court affirmed the dismissal of Petitioner’s state law claims by applying state equitable tolling law—and Petitioner has not argued, and therefore has waived, any argument that the appellate courts applied an incorrect standard of law. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (argument not properly raised below is waived); *see also Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996) (“[W]e do not normally grant petitions for certiorari solely to review what purports to be an application of state law.”).

II. PETITIONER’S SECOND QUESTION PRESENTED DOES NOT PROVIDE A BASIS FOR REVIEW

Petitioner’s Second Question Presented alleges that the courts below misapplied the “disinterestedness” requirement of 11 U.S.C. § 327(a). That question does not merit this Court’s review. To begin with, the Third Circuit did not consider the application of 11 U.S.C. § 327(a) because that argument was not properly before it and because Petitioner’s claims were time-barred. In addition, any prior determination regarding the “disinterestedness” requirement was fact-dependent and does not implicate any inter- or intra-circuit split. Finally, the Petition is a poor vehicle for review of any question involving 11 U.S.C. § 327(a)

because Petitioner's contentions are, yet again, barred by the doctrines of *res judicata* and collateral estoppel, as well as by waiver. As a result, the Petition should be denied.

A. The Application Of 11 U.S.C. § 327(a) Was Not Passed Upon Below

Although Petitioner alleges that Skadden was not disinterested as required by 11 U.S.C. § 327(a), that question was not properly raised by the Petitioner or passed upon in the Third Circuit's decision below. Rather, the Third Circuit's decision was entirely predicated on the fact that Petitioner's claims were time-barred. *See* Pet. App. at 1a-9a. Petitioner's request that the Court review the application of 11 U.S.C. § 327(a) is thus inconsistent with this Court's settled practice of declining to review issues not passed upon by the court of appeals. *See, e.g., Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) ("Because this is 'a court of review, not of first view,' it is generally unwise to consider arguments in the first instance.") (citation omitted) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-10 (2001) (per curiam) (dismissing writ and declining to parse constitutional issues not reviewed by the lower courts). As a result, the Court should deny review of the Second Question Presented.

B. There Is No Intra- or Inter-Circuit Conflict Regarding 11 U.S.C. § 327(a) That Would Alter The Outcome Of This Case

Petitioner's argument that his Second Question Presented implicates intra- and inter-circuit conflicts is incorrect. *First*, no conflict is implicated by the

Third Circuit’s unpublished, non-precedential opinion because Petitioner’s argument is based not on any purported error of law, but rather on the false factual predicate that Skadden was not disinterested as required by 11 U.S.C. § 327(a). *See* Pet. at 30-31. That contention has been rejected multiple times by multiple courts.⁹ The Bankruptcy Court, in its Final Fee Order, carefully weighed *all of the evidence before it*, including the March 2013 Disclosure and Skadden’s numerous other disclosures throughout the Chapter 11 cases, and explicitly found that “[a]t all times during these Chapter 11 cases (i) Skadden acted in good faith as counsel to Debtors and (ii) *did not hold or represent an interest adverse to Debtors’ estates and was disinterested within the meaning of 11 U.S.C. § 327(a).*” Opp’n App. at 49a (emphasis added).¹⁰ That fact-bound determination is not worthy of this Court’s review.

Second, the Third Circuit’s non-precedential decision below is entirely consistent with its own established jurisprudence on bankruptcy retentions

⁹ Indeed, Petitioner previously made the very same argument to this Court – i.e., that Skadden was not disinterested under 11 U.S.C. § 327(a) – in his prior unsuccessful petition for a writ of certiorari regarding the Final Fee Appeal. *See* Petition for Writ of Certiorari at 23-29, *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP*, 137 S. Ct. 294 (2016) (No. 15-1413).

¹⁰ Petitioner’s citation of *In re Federated Department Stores, Inc.*, 44 F.3d 1310 (6th Cir. 1995) in the Petition is inapposite as it assumes incorrectly that Skadden was not properly retained by the Debtors. *See* Pet. at 21 (citing *Federated* for the proposition that a court “cannot approve the employment of a person who is not disinterested, evne [*sic*] if the person does not have an adverse interest”).

and 11 U.S.C. § 327, including the case primarily relied upon by the Petitioner: *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138 (3d Cir. 1994). In *Price Waterhouse*, the Third Circuit reversed a bankruptcy court order allowing the debtors' employment of an accounting firm where the accounting firm was one of the twenty largest creditors of the estate and therefore was "*per se* interested" under 11 U.S.C. § 327(a). 19 F.3d at 140, 142 (citation omitted). Here, unlike in *Price Waterhouse*, the Final Fee Order, as affirmed on appeal, *conclusively and finally found that Skadden was disinterested* and thus was not *per se* interested within the meaning of 11 U.S.C. § 327(a). See Opp'n App. at 49a.

Petitioner also fails to establish that any inter-circuit split exists with respect to *In re Federated Department Stores, Inc.*, 44 F.3d 1310 (6th Cir. 1995),¹¹ the only out-of-circuit decision cited by Petitioner regarding 11 U.S.C. § 327(a). See Pet. at 30-31. The Third Circuit decision below is on all-fours with *Federated* for the same reasons it is consistent with *Price Waterhouse*. Namely, because the Final Fee Order previously found that Skadden "was disinterested within the meaning of 11 U.S.C. § 327(a)," *Federated* is not in tension with the opinion below. Opp'n App. at 49a. The Court should deny

¹¹ In *Federated*, the Sixth Circuit held that a financial advisor was improperly retained and compensated where the bankruptcy court itself acknowledged that the financial advisor "was not a 'disinterested person' as required by 11 U.S.C. § 327(a)," and where in spite of that acknowledgment, the bankruptcy court there nevertheless approved the retention and payment of the financial advisor. 44 F.3d at 1318-19.

review of the Petition because it fails to implicate any disagreement among courts of appeals.

**C. Resolution Of The Second Question
Presented Is Barred By *Res Judicata*,
Collateral Estoppel, And Waiver**

As with the First, Third, and Fourth Questions Presented, the Petition is an exceptionally poor vehicle for reviewing the Second Question Presented because consideration of that question is barred by *res judicata*, collateral estoppel, and waiver. Petitioner's 11 U.S.C. § 327(a) argument is based upon the same predicate facts that previously were litigated and decided against Petitioner in the Final Fee Order and subsequent appeals. As such, relitigation of those claims is barred by *res judicata* and collateral estoppel. *See, e.g., Tohono O'odham Nation*, 563 U.S. at 315 (holding that relitigation was precluded by *res judicata*); *Stauffer Chem.*, 464 U.S. at 169 (determining that relitigation was precluded by collateral estoppel). For that independent reason, Petitioner's claims fail. Because any ruling on Petitioner's 11 U.S.C. § 327(a) argument would not be outcome-dispositive, the Petition does not warrant this Court's review. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 249 (10th ed. 2013) (noting the Court's denial of certiorari where "[i]t was evident that the resolution of the conflict could not change the result reached below") (citing *Sommerville v. United States*, 376 U.S. 909 (1964)).

In addition, Petitioner waived his Second Question Presented by failing to raise it below. *See Sprietsma*, 537 U.S. at 56 n.4 (argument not properly raised below is waived). Petitioner did not include in his issues on appeal to the District Court any

allegation that Skadden was not disinterested as required by 11 U.S.C. § 327.¹² Petitioner is therefore barred from raising the argument now. For that additional reason, this case is a poor vehicle for review of the Questions Presented.

CONCLUSION

For all of the reasons set forth above, the Petition should be denied.

Respectfully submitted,

M. KELLY TILLERY
Counsel of Record
 PEPPER HAMILTON LLP
 3000 TWO LOGAN SQUARE
 EIGHTEENTH & ARCH STREETS
 PHILADELPHIA, PA 19103-2799
 (215) 981-4000
 tilleryk@pepperlaw.com

*Counsel for Skadden
 Respondents*

Dated: June 22, 2018

¹² See generally Appellants' Statement of Issues on Appeal of the Order Dismissing the Adversary Case Against the Defendants Skadden, Arps, Meagher, Slate & Flomm [*sic*] LLP, et al, & Tennenbaum Capital Partners LLC, et. al. on Constitutional Grounds Due to the Existence [*sic*] of Substantive Noncore Claims & Lack of Proper Discovery, *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP, et al. (In re Radnor Holdings Corp.)*, Case No. 06-10894, Adv. No. 12-51308 (KG) (Bankr. D. Del. May 20, 2016), ECF No. 129 (failing to argue that the Dismissal Order was inconsistent with 11 U.S.C. § 327 or that Skadden was not disinterested).

APPENDIX

1a

**APPENDIX A — DENIAL OF PETITION FOR
WRIT OF CERTIORARI, KENNEDY V. SKADDEN,
ARPS, SLATE, MEAGHER & FLOM LLP, 137 S. CT.
294 (2016), DATED OCTOBER 11, 2016**

SUPREME COURT OF THE UNITED STATES

No. 15-1413

MICHAEL T. KENNEDY,

Petitioner,

v.

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP.

Case below, 629 Fed.Appx. 277.

Petition for writ of certiorari to the United States
Court of Appeals for the Third Circuit denied.

**APPENDIX B — THIRD CIRCUIT AFFIRMANCE
OF FINAL FEE ORDER, IN RE RADNOR
HOLDINGS CORP., 629 F. APP’X 277 (3D CIR. 2015),
FILED DECEMBER 10, 2015**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-3794

IN RE: RADNOR HOLDINGS CORPORATION, *et al.*,

Debtors,

MICHAEL T. KENNEDY,

Appellant.

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-13-cv-01398)
District Judge: Honorable Sue L. Robinson

November 19, 2015, Submitted Under
Third Circuit LAR 34.1(a);
December 10, 2015, Opinion Filed

Before: AMBRO, NYGAARD, and RENDELL,
Circuit Judges.

*Appendix B***OPINION***

AMBRO, *Circuit Judge*

Radnor Holdings Corporation filed for Chapter 11 bankruptcy protection in 2006. The Bankruptcy Court authorized Skadden, Arps, Slate, Meagher & Flom LLP to serve as bankruptcy counsel and approved Skadden's final fee application in June 2013. Michael Kennedy had filed objections to the final fee application and appealed to the District Court. It affirmed the decision of the Bankruptcy Court and Kennedy has appealed *pro se* the District Court's order.¹ We affirm.

I.

After filing for bankruptcy, Radnor applied to the Bankruptcy Court for an order authorizing it to retain Skadden. The United States Trustee objected because Skadden had disclosed that it represented Tennenbaum Capital Partners LLC in unrelated matters. At the time, Tennenbaum owned stock in Radnor and controlled one of Radnor's four board seats. In September 2006, the Bankruptcy Court conducted a hearing and entered an order approving Skadden's application. Based on Skadden's disclosures, the Court concluded that Tennenbaum was not a significant client and that Skadden's relationship

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

1. Kennedy was a lawyer and member of the Pennsylvania bar from 1998 to 2003.

Appendix B

with it was not a disabling conflict of interest. Shortly thereafter, Tennenbaum purchased all of Radnor's stock and assets through a bankruptcy sale after attempts at a restructuring proved unsuccessful.

Fast forward to November 2012, when Skadden filed its final fee application. Kennedy (then represented by counsel) filed written objections. After a two-day evidentiary hearing and post-hearing briefing, the Bankruptcy Court overruled Kennedy's objections and approved the fee application.

On appeal by Kennedy, the District Court affirmed the Bankruptcy Court's decision. He now appeals to us.²

II.

"Our review of the District Court's decision effectively amounts to review of the [B]ankruptcy [C]ourt's opinion in the first instance." *In re Hechinger Inv. Co. of Delaware*, 298 F.3d 219, 224 (3d Cir. 2002). We review the latter's factual findings for clear error, any questions of law *de novo*, and the approval of the fee application for abuse of discretion. *Zolfo, Cooper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253, 257 (3d Cir. 1995).

2. The District Court had jurisdiction over the final order of the Bankruptcy Court under 28 U.S.C. § 158(a). We have jurisdiction over the District Court's order per 28 U.S.C. § 158(d).

Appendix B

III.

Kennedy argues that the Bankruptcy Court abused its discretion in granting the fee application because Skadden’s pre-retention disclosures failed to comply with Bankruptcy Rule 2014. Under that Rule, a debtor’s application to employ an attorney shall state, “to the best of the applicant’s knowledge,” the attorney’s “connections with the debtor, creditors, [and] any other party in interest.” Fed. R. Bank. P. 2014. Kennedy alleges that Skadden failed to disclose in its application to the Bankruptcy Court certain investments in Tennenbaum and its affiliates. The Bankruptcy Court disagreed. After reviewing all the evidence and conducting an in-person hearing, it found that Skadden had not misrepresented its relationship with Tennenbaum. Kennedy has not shown that this finding was clearly erroneous and, absent any violation of Rule 2014, the Bankruptcy Court did not abuse its discretion in approving the fee application.

Kennedy also contends that Bankruptcy Court erred in 2006 in approving Skadden as bankruptcy counsel because it was not disinterested, as required by 11 U.S.C. § 327. But any challenge to the Bankruptcy Court’s initial approval of Skadden is not properly before us because Kennedy never appealed the retention order or previously identified the order as an issue for this appeal. *Shareholders v. Sound Radio, Inc.*, 109 F.3d 873, 879 (3d Cir. 1997) (“The failure to file a timely notice of appeal creates a jurisdictional defect barring appellate review.”); *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 104 (3d Cir. 1988) (holding Bankruptcy Court order approving retention of a law firm retroactively was appealable order).

Appendix B

Kennedy asserts that we have jurisdiction because the Bankruptcy Court “reaffirmed” the 2006 order in 2013 when it approved the final fee application. Nowhere in the Bankruptcy Court’s opinion, however, did it purport to reaffirm an earlier order.

Kennedy next claims that the Bankruptcy Court’s factual findings in its 2013 opinion were clearly erroneous because it failed to consider evidence of Skadden’s willful misconduct. This is incorrect. The Bankruptcy Court noted that it had considered the entire record before approving the fee application, and Kennedy is unable to identify any particular evidence that was omitted. In effect, he is arguing that the Bankruptcy Court did not construe the evidence in order to reach his desired conclusions. This is not a ground for reversal. *In re Myers*, 491 F.3d 120, 126 (3d Cir. 2007) (“The [B]ankruptcy [C]ourt is best positioned to assess the facts, particularly those related to credibility . . .”).

Finally, Kennedy argues that the Bankruptcy Court abused its discretion in denying his motion to vacate the sale and confirmation orders entered in Radnor’s bankruptcy. The Court denied the motion as time-barred in April 2013 and Kennedy never appealed the order or raised this issue for appeal. Accordingly, any challenge to that denial is not properly before us. *Shareholders*, 109 F.3d at 879.

* * * *

We thus affirm the decision of the District Court affirming the ruling of the Bankruptcy Court.

**APPENDIX C — DISTRICT COURT AFFIRMANCE
OF FINAL FEE ORDER, KENNEDY V. SKADDEN,
ARPS, SLATE, MEAGHER & FLOM LLP (IN RE
RADNOR HOLDINGS CORP.), 528 B.R. 245
(D. DEL. 2014), FILED AUGUST 14, 2014**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

Civ. No. 13-1398-SLR

In re: RADNOR HOLDINGS CORPORATION, *et al.*,

Debtors.

MICHAEL T. KENNEDY,

Appellant,

v.

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP,

Appellee.

August 13, 2014, Decided;
August 14, 2014, Filed

*Appendix C***MEMORANDUM OPINION****ROBINSON, District Judge****I. INTRODUCTION**

Appellant Michael T. Kennedy (“appellant”) filed this bankruptcy appeal on August 7, 2013, (D.I. 1) At the time, he was represented by counsel, but now appears *pro se*. The appeal arises from an order entered by the bankruptcy court on June 20, 2013, that overruled an objection by appellant to Skadden, Arps, Slate, Meagher & Flom, LLP’s (“Skadden”) final fee application and that granted appellee’s final fee application. The court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a).

II. BACKGROUND

On August 21, 2006, Radnor Holdings Corporation (“Radnor”) and numerous related subsidiaries (“debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. On August 25, 2006, debtors, as debtors-in-possession, applied to the bankruptcy court (the “Skadden retention application”) for an order authorizing debtors to retain Skadden as their bankruptcy counsel, effective as of the petition date, pursuant to an engagement agreement dated July 5, 2006. (Bankr. No. 06-10894-PJW, D.I. 96). The retention application was opposed, pre-retention disclosures were provided to the bankruptcy court, and a contested hearing was held on September 20, 2006. (*Id.* at D.I. 169, 223, 298)

Appendix C

On September 21, 2006, the bankruptcy court authorized the employment of Skadden as counsel to debtors and debtors-in-possession. (*Id.* at D.I. 246)

On November 18, 2012, Skadden filed its final fee application for compensation for services rendered and reimbursement of expenses as counsel to debtors for the period from August 21, 2006 through and including September 28, 2012. (*Id.* at D.I. 1989) On December 26, 2012 appellant filed an objection to the fee application.¹ (*Id.* at D.I. 1993) An evidentiary hearing was held on May 1 and 2, 2013, followed by post-hearing briefing by the parties. (*Id.* at 2053, 2063, 2068, 2073) On June 20, 2013, the bankruptcy court entered a memorandum opinion and order granting the final fee application. (*Id.* at D.I. 2076) The memorandum opinion and order is the subject of this appeal.

III. STANDARD OF REVIEW

In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. *See American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). 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." *In re Cellnet Data Sys., Inc.*, 327 F.3d

1. The objection was combined with a motion to set aside the November 1, 2006 sale order and sought other relief. (*Id.*)

Appendix C

242, 244 (3d Cir. 2003) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness.” Fed. R. Bankr. P. 8013.

With mixed questions of law and fact, the court must accept the bankruptcy court’s “finding of historical or narrative facts unless clearly erroneous, but exercise[s] ‘plenary review of the [bankruptcy] court’s choice and interpretation of legal precepts and its application of those precepts to the historical facts.’” *Mellon Bank, N.A. v. Metro Commc’ns, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court’s appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a *de novo* basis bankruptcy court opinions. *See In re Hechinger Inv. Co. of Delaware*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup, Inc.*, 281 F.3d 133, 136 (3d Cir. 2002).

IV. ISSUES RAISED ON APPEAL

Appellant raises the following issues for review (D.I. 2):

- (1) whether the bankruptcy court committed error in granting Skadden’s final fee application despite Skadden’s failure as counsel to debtors to

Appendix C

accurately and fully disclose direct investments by Skadden partners in the senior secured creditors to debtor, Tennenbaum funds, controlled affiliates of Tennenbaum Capital Partners, LLC;

(2) whether the bankruptcy court committed error in granting Skadden's final fee application despite Skadden's failure to fully disclose its ongoing representation of Tennenbaum funds;

(3) whether the bankruptcy court committed error in granting Skadden's final fee application despite refusing to require Skadden to disclose the dollar amount of attorney's fees paid by Tennenbaum to Skadden as well as the amounts and character of the equity investments by Skadden partners in Tennenbaum funds; and

(4) whether the bankruptcy court committed error in adopting findings of fact and conclusions of law, prior to discovery being conducted, affecting the related adversary case, *Radnor Holdings Corp. v. Skadden, Arps, Slate, Meagher & Flom LLP*, Adv. No. 12-51308-PJW (Bankr. D. Del.) .

V. DISCUSSION

"A debtor in possession . . . may, with bankruptcy court approval, employ one or more attorneys to represent it and to assist it in fulfilling its duties." *In re Pillowtex*,

Appendix C

Inc., 304 F.3d 246, 250 (3d Cir. 2002) (citing 11 U.S.C. § 327). “[T]he power of a debtor in possession to employ . . . professionals is the same as that of a trustee. The extent of this power is specified by Section 327(a). . . .” *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994) (citations omitted). Section 327(a) provides that a court may approve the employment of attorneys only if they “do not hold or represent an interest adverse to the estate” and they are “disinterested persons.” 11 U.S.C. § 327(a). These two prohibitions on employment set forth two separate standards for disqualification. *Pillowtex*, 304 F.3d at 252 n.4. The first prohibits attorneys from holding or representing any interest adverse to the estate.” *Id.* The second prohibits attorneys who are not disinterested from providing representation. *Id.* As defined by the Bankruptcy Code, attorneys are disinterested if they “do[] not have an interest materially adverse to the interest of. . . any class of creditors or equity holders” 11 U.S.C. § 101(14)(C); *see Pillowtex*, 304 F.3d at 252 n.4. “Thus a professional may not have any conflict with the estate, while a conflict with creditors must be ‘material.’” *Pillowtex*, 304 F.3d at 252 n.4.

The Court of Appeals for the Third Circuit has interpreted § 327(a) “to impose[] a per se disqualification . . . of any attorney who has an actual conflict of interest;” to permit a court to exercise “its discretion . . . [to] disqualify an attorney who has a potential conflict of interest;” and to forbid a court from “disqualify[ing] an attorney on the appearance of conflict alone.” *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 476 (3d Cir. 1998). While the term “actual conflict of interest” has not been defined in

Appendix C

the Code, the Third Circuit has explained that “a conflict is actual, and hence per se disqualifying, if it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest.” *Pillowtex*, 304 F.3d at 251. “Courts have been accorded considerable latitude in using their judgment and discretion in determining whether an actual conflict exists in light of the particular facts of each case.” *In re B H & P, Inc.*, 949 F.2d 1300, 1315 (3d Cir. 1991) (internal quotation marks omitted). Although a court may initially authorize the employment of counsel, it must disqualify counsel upon learning of an actual conflict, and it may exercise its discretion to remove counsel if there is a potential conflict. *See id.* at 1314-17.

Section 330(a) (1) of the Bankruptcy Code provides that a court may award to a professional person reasonable compensation “[a]fter notice to the parties in interest and the United States Trustee and a hearing.” 11 U.S.C. § 330(a)(1). When a bankruptcy court orders a hearing on a fee application, in addition to considering the fee application itself, “the court should carefully consider relevant, competent evidence submitted with the fee application, provided as a supplement to the fee application, or presented at a hearing.” *In re Busy Beaver Bldg. Centers*, 19 F.3d 833, 854 (3d Cir. 1994). “What evidence is ‘relevant’ and ‘competent’ will be determined by applying ordinary evidentiary rules, because with limited supplementation in the Bankruptcy Rules, ‘[t]he Federal Rules of Evidence . . . apply in cases under the Code.’” *In re Grasso*, 2014 U.S. Dist. LEXIS 94274, 2014 WL 3389119 (E.D. Pa. July 11, 2014) (quoting Fed.

Appendix C

R. Bankr. P. 9017). “[T]he court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 . . . if, at any time during such professional person’s employment under section 327. . . , such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.” 11 U.S.C. § 328(c).

A. Disclosure

Appellant contends that the bankruptcy court erred in granting Skadden’s final fee application because Skadden failed to accurately and fully disclose direct investments by its partners in Tennenbaum funds, Skadden failed to fully disclosure its ongoing representation of Tennenbaum funds, and the bankruptcy court refused to require Skadden to disclose the dollar amount of its attorney fees paid by Tennenbaum. Appellant argues that Skadden’s disclosures were inadequate but, nonetheless, the bankruptcy granted the final fee application because it felt constrained by a prior ruling that granted Skadden’s retention application.²

2. Towards the end of the final fee application hearing when discussing post-hearing briefing, the bankruptcy judge stated, “[i]n putting this matter into context, I note that while the petition was filed on August 8th, the retention order was not entered until September 20th, and there’s a couple observations that I want to make regarding this, even though I’m going to ask for post-trial briefing. In the U.S. Trustee’s objection it noted . . . , a sale is anticipated to occur within 60 days of the filing, ... One of the reasons I note it in ruling on the motion was that [] throwing Skadden off the case two months into the case, and with all the pre-petition

Appendix C

Appellant contends that the appropriate remedy was to deny allowance of compensation due to the inadequate disclosures.

In ruling on the final fee application, the bankruptcy court considered: (1) Skadden's three disclosure declarations (August 29, 2006, September 18, 2006, December 19, 2007); (2) that Skadden did not block or hinder the Trustee from investigating and objecting to debtors' retention of Skadden as their bankruptcy counsel; (3) disclosures made by then Skadden partner Gregg M. Galardi ("Galardi") at a September 20, 2006 hearing; (4) testimony elicited from Galardi and appellant during the May 1 and 2, 2013 final fee hearing; (5) exhibits submitted during the May 2013 hearing, including a full waiver

work they did I think could have resulted in chaos, and I note in the transcript, on page 44, I said, quote, I think it's going to be more of a nightmare if they're kicked out of the case at this late date given the activity that's gone on. And [] so I did consider the fact that it would be highly disruptive, if not a killer, to switch counsel in the middle of the case. I was influenced by the timing of this matter. And I must observe at this point that given the reason why I have authorized the retention I would be reluctant to deny Skadden's final request, given the fact that they were in the case because of my authorization I'm not going to comment further on the evidence, but I do find that [] at this late date this is an unusual request. But I think -- I'll stop observing on the evidence and just simply say I want post-trial briefs, and we'll open with the Kennedy post-trial brief as to why the retention order should be rescinded, and then we'll have a response by Tennenbaum and Skadden, and a reply by Kennedy, and I'm open to suggestions as to when they should be filed. . . . I mis-stated. It's a motion to disallow final fee authorization. But I think that the opening briefs should come from Mr. Kennedy." (Bankr. No. 06-10894-PJW, D.I. 2063 at 59-60)

Appendix C

from Tennenbaum of any conflicts posed by Skadden's representation of debtors; (5) evidence of the percentage of billable hours, percentage of revenue and nature of legal work Skadden had performed for Tennenbaum;³ and (6) exhibits submitted by appellant in opposition to the final fee application.

The bankruptcy court gave no weight to certain testimony provided by appellant, found appellant lacked credibility with regard to other testimony, and found that appellant made numerous assertions devoid of specific facts to support his position. The bankruptcy court reaffirmed that the percentage of Skadden's revenues attributed to Tennenbaum and its affiliates was not a material percentage. It concluded that Tennenbaum was not a significant client of Skadden, that Skadden's revenue derived from Tennenbaum was not significant, that the Skadden-Tennenbaum relationships presented no improprieties, and that it was not concerned that Skadden may be influenced in any fashion not to engage in the best representation of the debtor. Finally, the bankruptcy court concluded that Skadden's pre-retention disclosures and other disclosures made in connection with Skadden's

3. During the September 20, 2006 Skadden retention application hearing, the bankruptcy court discussed a disclosure method he adopted with regard to fees and large firms that appear frequently and who represent the debtor as well as creditors, stating, "[a]nd that's why many years ago I adopted the policy of trying to find out the significance of those creditors to that law firm's clientele, and thus developed the idea of counsel representing to the court the percentage of their business derived from particular creditors of the debtor." (Bankr. No. 06-10894-PJW, D.I. 298 at 55)

Appendix C

retention as bankruptcy counsel, including Skadden's disclosures with respect to Tennenbaum, were adequate and sufficient.

The court finds no error was committed by the bankruptcy court in granting Skadden's final fee application. A fair reading of the record and the thorough and reasoned memorandum opinion and order demonstrates that the bankruptcy court properly considered and exercised its discretion to weigh the evidence. The challenged findings hinged, in part, on a credibility determination regarding the evidence presented to the bankruptcy court. As the trier of fact, the bankruptcy court was in a better position to evaluate the credibility of the witnesses than is this court. *See In re Myers*, 491 F.3d 120, 126 (3d Cir. 2007) ("The bankruptcy court is best positioned to assess the facts, particularly those related to credibility . . ."). Accordingly, the court defers to the bankruptcy court's factual findings, which are not clearly erroneous and are supported by the record. *See DiFederico v. Rolm*, 201 F.3d 200, 208 (3d Cir. 2000).

B. Adoption of Findings of Fact and Conclusions of Law

Appellant's last issue is whether the bankruptcy court committed error in adopting findings of fact and conclusions of law, prior to discovery being conducted, affecting a related adversary case, *Radnor Holdings Corp. v. Skadden, Arps, Slate, Meagher & Flom LLP*. (See D.I. 2 at ¶ 4) Appellant discusses the issue in his reply brief (D.I. 16, ¶ III), but failed to argue the issue

Appendix C

in his opening brief. Because appellant failed to clearly raise the foregoing issue in his opening brief, the court need not consider the issue. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (“It is well settled that an appellant’s failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal.”); *accord United States v. Vas*, 497 F. App’x 203 n.4 (3d Cir. 2012) (unpublished) (appellate court stated that it need not consider issue addressed in reply brief when appellant failed to raise it clearly in the opening brief). Appellant waived this last issue by failing to address it in his opening brief, and it is not considered by the court.

VI. CONCLUSION

For the reasons discussed, the bankruptcy court’s June 20, 2013 order will be affirmed, and the appeal will be dismissed.

/s/ Sue L. Robinson
UNITED STATES DISTRICT JUDGE

**APPENDIX D — FINAL FEE ORDER, IN RE
RADNOR HOLDINGS CORP., CASE NO. 06-10894,
2013 WL 3228116 (BANKR. D. DEL. JUNE 20, 2013),
FILED JUNE 20, 2013**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 06-10894(PJW)
Jointly Administered

IN RE: RADNOR HOLDINGS CORPORATION, *et al.*,

Debtors.

June 20, 2013, Decided

**MEMORANDUM OPINION AND ORDER
REGARDING THE OBJECTION OF MICHAEL T.
KENNEDY TO THE FINAL FEE APPLICATION
OF SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP (DOC. # 1993)**

WALSH, J.

This Court having previously authorized the employment of Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”) as counsel to the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”); and the Final Fee Application of Skadden, Arps, Slate, Meagher & Flom LLP for Compensation for Services Rendered and Reimbursement of Expenses as Counsel to Debtors for the Period From August 21, 2006

Appendix D

Through and Including September 28, 2012 (the “Final Fee Application”) and Michael T. Kennedy (“Kennedy”) having filed an objection to the Final Fee Application (the “Kennedy Objection”); and this Court having conducted an evidentiary hearing on the Final Fee Application on May 1 and May 2, 2013; and this Court having fully considered the record before it, the evidence adduced and the arguments of counsel; and upon the entire record of these Chapter 11 cases; and it appearing that the relief requested by the Final Fee Application is warranted.

This Chapter 11 case commenced in August 2006 and is just now concluding. The docket sheet shows that there have been 2075 docket entries. Significant and relevant docket entries are identified below:

<i>Filing Date</i>	<i>Docket #</i>	<i>Item</i>
08/21/2006	1	Chapter 11 Voluntary Petition of Radnor Holdings Corporation
08/21/2006	24	Motion to Approve (I) An Order (A) Establishing Bidding Procedures Relating to the Sale of the Debtors’ Assets, (B) Scheduling A Hearing To Consider the Proposed Sale and Approving the Form and Manner of Notice Thereof...

Appendix D

08/25/2006	96	Application to Employ Skadden Arps as Bankruptcy Counsel for the Debtors filed by Radnor Holdings Corporation
09/01/2006	132	Application to Employ Wilmer Cutler Pickering Hale and Dorr LLP as Special Investigative Counsel to the Company Acting through the Special Committee of the Board of Directors of Radnor Holdings Corporation Nunc Pro Tunc
09/13/2006	169	Objection to Debtors' Application for Order Under Bankruptcy Code Sections 327(a), 328 and 329 and Bankruptcy Rules 2014 and 2016 Authorizing Employment and Retention of Skadden Arps, Slate, Meagher & Flom LLP... Filed by U.S. Trustee
09/18/2006	223	Declaration in Support Supplement to Declaration of Gregg M. Galardi In Further Support of Debtors' Application...Authorizing Employment and Retention of Skadden, Arps...

Appendix D

09/21/2006	246	Order Authorizing Employment and Retention of Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates as Bankruptcy Counsel to the Debtors and Debtors in Possession Nunc Pro Tunc
09/22/2006	276	Order Authorizing Employment and Retention of Wilmer Cutler Pickering Hale and Dorr, LLP As Special Investigative Counsel...
10/18/2006	425	Motion to Allow Order Granting the Committee Standing to Prosecute Actions on Behalf of the Debtors' Estates Against Tennenbaum Capital Partners, LLC, Special Value Expansion Fund, LLC, Special Value Opportunities Fund, LLC and Jose E. Feliciano, and for Related Relief

Appendix D

10/25/2006	476	Notice of Debtors' Objection to Claims of Tennenbaum Capital Partners, LLC, Special Value Expansion Fund, LLC and Special Value Opportunities Funds, LLC
10/30/2006	512	Order Granting Official Committee of Unsecured Creditors Standing to Prosecute Actions on Behalf of the Debtors' Estates Against Tennenbaum Capital Partners, LLC, Special Value Expansion Fund, LLC, Special Value Opportunities Fund, LLC and Jose Feliciano
10/31/2006	526	Adversary case 06-50909. Complaint by the Official Committee of Unsecured Creditors of Radnor Holdings Corporation, et al. against Tennenbaum Capital Partners, LLC, Special Value Expansion Fund, LLC, Special Value Opportunities Fund, LLC, Jose E. Feliciano

Appendix D

11/21/2006	698	Order (WITH REVISIONS) (1) Approving Sale of Substantially all of Debtors' Assets Free and Clear of all Liens, Claims, Interests and Encumbrances
02/21/2008	1246	First Amended Chapter 11 Plan Filed
09/10/2012	1976	Findings of Fact, Conclusions of Law and Order Confirming Modified Second Amended Joint Plan of Liquidation of Radnor Holdings Corporation and Its Affiliated Debtors and Debtors in Possession
12/26/2012	1993	Motion for an Order Setting Aside the November 21, 2006 Sale Order Objecting to Skadden Fee Application (Filed by Kennedy)

1. On August 25, 2006, Debtors as debtors-in possession applied to the Court (the “Skadden Retention Application”)(Doc. # 96) for an order authorizing Debtors to retain Skadden as their bankruptcy counsel, effective as of the petition date, pursuant to an engagement agreement dated July 5, 2006 (the “Engagement Agreement”).

Appendix D

2. The Skadden Retention Application was authorized and filed by Debtors. *See* Action by Written Consent of the Board of Directors of Radnor Holdings Corporation dated August 21, 2006, annexed to Radnor's chapter 11 petition (Doc. # 1).

3. In support of the Skadden Retention Application, Skadden filed three disclosure declarations: (i) Declaration of Gregg M. Galardi In Support Of Debtors' Application For Order Under Bankruptcy Code Sections 327(a), 328, and 329 and Bankruptcy Rules 2014 And 2016 Authorizing Employment and Retention of Skadden, Arps, Slate, Meagher & Flom LLP And Affiliates As Bankruptcy Counsel To The Debtors and Debtors In Possession Nunc Pro Tunc To The Petition Date, dated August 29, 2006 (the "Galardi August 2006 Declaration") (Doc. # 96); (ii) Supplement To Declaration of Gregg M. Galardi In Further Support Of Debtors' Application For Order Under Bankruptcy Code Sections 327(a), 328, and 329 and Bankruptcy Rules 2014 And 2016 Authorizing Employment and Retention Of Skadden, Arps, Slate, Meagher & Flom LLP And Affiliates As Bankruptcy Counsel To The Debtors and Debtors In Possession Nunc Pro Tunc To The Petition Date, dated September 18, 2006 (the "Galardi September 2006 Supplemental Declaration") (Doc. # 223); and (iii) Second Supplement to Declaration of Gregg M. Galardi in Further Support of Debtors' Application for Order under Bankruptcy Code Sections 327(a), 328, and 329 and Bankruptcy Rules 2014 and 2016 Authorizing Employment and Retention of Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates as Bankruptcy Counsel to the Debtors and Debtors in Possession Nunc

Appendix D

Pro Tunc to the Petition Date, dated December 19, 2007 (the “Galardi December 2007 Supplemental Declaration”) (Doc. # 1222).

4. On September 13, 2006, the Office of the United States Trustee (“UST”) objected to the Skadden Retention Application (the “UST Objection”)(Doc. # 169). Skadden did not block or hinder the UST from investigating and objecting to Debtors’ retention of Skadden as their bankruptcy counsel. Galardi disclosed information to the UST about a Skadden partner’s connections to Tennenbaum Capital Partners LLC and related entities (“Tennenbaum”). 9/20/06 Hearing Tr. At 36-37.

5. Prior to and at the September 20, 2006 hearing on Skadden’s retention as bankruptcy counsel, then Skadden partner Gregg M. Galardi disclosed in two declarations and in open court the following (collectively, the “Pre-Retention Disclosures”):

- “Skadden, Arps currently represents, or has represented, Tennenbaum on matters unrelated to the Debtors. In addition, Skadden, Arps has determined that in September and October of 2005, Skadden, Arps attorney provided tax advice to Tennenbaum in connection with the structure of its potential investment in Radnor. The Skadden, Arps attorney billed less than the aggregate amount of 5.0 hours to the matter, and prior to taking on the restructuring engagement, Skadden, Arps obtained a full waiver from Tennenbaum.” (Galardi August 2006 Declaration ¶ 19).

Appendix D

- “During the twelve-month period ending June 30, 2006 (the “trailing Twelve Months”), the value of the time billed to Tennenbaum matters accounted for only approximately .027% of the value of the time billed to all client matters for the Firm.” (Galardi August 2006 Declaration ¶ 19 n. 4); *see also* 9/20/06 Hearing Tr. at 33, 60-61.
- “Richard T. Prins, Esquire, a partner at Skadden, Arps, is the primary engagement partner on matters for Tennenbaum ... Skadden, Arps’ work on behalf of Tennenbaum consists generally of representation Tennenbaum in its capacity as a registered investment adviser, and occasionally on corporate matters.... Any work that Skadden, Arps does for the investment funds of Tennenbaum & Co., ...consists primarily of three types of representations. First, ...assists such funds in their formation and in raising capital.... Second, ...appears on behalf of such funds before the United States Securities and Exchange Commission... in connection with the various regulatory and reporting requirements of such funds. Third,... represents such funds on day to day corporate matters.” (Galardi September 2006 Supplemental Declaration ¶¶ 5-9).
- “Occasionally in connection with fund work, Tennenbaum requests Skadden, Arps to provide tax planning advice or SEC regulatory advice about potential investments. Often this is on a no names hypothetical basis. As set forth in the Initial

Appendix D

Declaration, in September and October of 2005, a Skadden, Arps tax lawyer provided 5 hours of tax structuring advice to Tennenbaum regarding the tax structure of a security, which turned out to be the security the funds acquired in Radnor.” (*Id.*).

- Five hours of tax work was performed by Skadden, Arps for Tennenbaum regarding Radnor. (9/20/06 Hearing Tr. at 34).
- Certain Skadden partners invested in Tennenbaum affiliated funds, over which they had no investment authority. (*Id.* at 37).

6. Each of these Pre-Retention Disclosures was made openly, publicly and to this Court prior to this Court’s approval and authorization of Skadden’s retention.

7. At the final fee hearing, Galardi testified that the preretention disclosures he made -- which were discussed with Radnor’s general counsel, Carrie Williamson, in the presence of Kennedy (*see* 5/1/13 Hearing Tr. at 74) -- disclosed all information that was known to Galardi at the time, and that each of his disclosures was “full and accurate.” *See* 5/1/13 Hearing Tr. at 87.

8. After a contested evidentiary hearing on September 20, 2006 on the Skadden Retention Application, during which Skadden’s connections with Tennenbaum were explored and evaluated, this Court overruled the UST objection and entered an order (the “Retention Order”) (Doc. # 246) authorizing Debtors to employ Skadden as

Appendix D

their counsel effective as of the petition date pursuant to the terms of the Engagement Agreement. *See generally* Transcript of September 20, 2006 Hearing (Doc. # 298).

9. In the trailing twelve months before the date of the bankruptcy filing, Tennenbaum and its affiliates represented .027% of Skadden's revenues. *See* Skadden Exhibit 1 (5/1/13 Hearing Exhibits); 5/1/13 Hearing Tr. at 86-87. The Court ruled at the time of the Skadden retention hearing, and re-affirms now, that this is not a material percentage. *See* 5/1/13 Hearing Tr. at 86. That percentage is not a disabling conflict and does not support any of Kennedy's allegations.

10. Based on evidence of the percentage of billable hours, percentage of revenues and nature of legal work Skadden had performed for Tennenbaum, and after argument from the UST and Skadden at the September 20, 2006 evidentiary hearing on the Skadden Retention Application, the Court concluded that Tennenbaum was not a significant client of Skadden, that Skadden's revenue derived from Tennenbaum was not significant, that the Skadden-Tennenbaum relationships presented no improprieties, and that the Court was "not concerned that Skadden Arps may be influenced in any fashion to not engage in the best representation of the debtor." 9/20/06 Hearing Tr. at 60-62.

11. Given the full record of Skadden disclosures, Skadden did not misrepresent its relationships with Tennenbaum to the Court or the UST. Skadden's numerous disclosures in these Chapter 11 cases (including

Appendix D

the Galardi declarations and Skadden's statements at the September 20, 2006 hearing) were extensive, publicly filed, made on the record, and available to any member of the public, including Kennedy. Issues regarding Skadden's retention and connections to Tennenbaum were also addressed before the Court at the October 27, 2006 hearing on the Committee's Standing Motion. *See* Transcript of October 27, 2006 Hearing (Doc. # 582). Williamson, Radnor's then general counsel, attended both the September 20, 2006 and October 27, 2006 hearings. *Id.* at p. 68.

12. Skadden's pre-existing attorney client relationship with Tennenbaum was disclosed and known to Kennedy, Debtors, their general counsel and their directors when Skadden was retained prepetition by Debtors and as their chapter 11 counsel upon the commencement of these Chapter 11 cases. Skadden's Engagement Agreement discloses Skadden's ongoing representation of Tennenbaum and its affiliates, and provides for the waiver of any conflicts arising out of that representation. Williamson, Debtors' general counsel, was involved throughout Debtors' process of selecting counsel, and was present in the courtroom at the September 20, 2006 hearing on Skadden's retention.

13. Galardi had frequent interactions with Kennedy. From the time of Skadden's engagement through at least the date of the sale of Radnor's assets. Galardi "had, if not daily, very, very regular dealings with Kennedy, his counsel, [and] other members of the board of directors." 5/1/13 Hearing Tr. at 39.

Appendix D

14. At the very first board meeting in which Galardi and Mr. Pohl were pitching to be retained as restructuring counsel, they disclosed that Tennenbaum was a client of Skadden and that Skadden would require a conflicts waiver to take an adverse position to Tennenbaum. 5/1/13 Hearing Tr. at 42. Two Tennenbaum individuals -- Jose Feliciano and David Hollander, Tennenbaum's general counsel -- attended the meeting. *Id.* at 40-41. Galardi told them, and all other attendees, that there could later develop circumstances where Skadden, in representing Radnor, would be required to be adverse to Tennenbaum. *Id.* at 43. Radnor board members and Williamson, Radnor's general counsel, were present when (in person or on the telephone) these remarks were made. *Id.* at 43-44; *cf.* 5/1/13 Hearing Tr. at 72.

15. Following the meeting, Galardi worked with Skadden partner Patricia Moran to draft an engagement letter which disclosed the Tennenbaum relationship. 5/1/13 Hearing Tr. at 44. After Galardi went over its contents with Radnor's general counsel, the engagement letter was signed by Kennedy. *See* Skadden Exhibit 5 (5/2/13 Hearing Exhibits); 5/1/13 Hearing Tr. at 78, 80. The letter disclosed Skadden's 'on-going representation of Tennenbaum Capital Partners LLC and its affiliates.' Skadden Exhibit 5 at p. 6 (5/2/13 Hearing Exhibits); 5/1/13 Hearing Tr. at 79.

16. Kennedy's allegation that "Skadden was selected to represent the Debtors by Tennenbaum" has no basis in fact. 5/1/13 Hearing Tr. at 51. Skadden was chosen and retained by Radnor. Kennedy signed Skadden's retention

Appendix D

letter. *Id.* Tennenbaum did not control Debtors' affairs, and no one at Tennenbaum ever exercised control over the Radnor board of directors. 353 B.R. at pp. 834-35.¹ Whatever influence Tennenbaum exerted on the directions of Debtors was indirect, arising from the covenants and other provisions Tennenbaum contracted for in its credit agreement with Debtors. *Id.* at 847.

17. Kennedy's allegations that "the Radnor board was steered throughout the retention process by Skadden and Tennenbaum" has no basis in fact. 5/1/13 Hearing Tr. at 51-52. Skadden did not participate in the board meeting where the subject of retention was considered and decided upon. Tennenbaum, in turn, had only one vote out of four. *Id.* Cf. 353 B.R. at 834-35 ("TCP appointed one board member out of a total of four, and it did not control Debtors' affairs...Mr. Kennedy, as majority shareholder and CEO, controlled of Radnor at all times.").

18. The documentary evidence and testimony demonstrates that Feliciano of Tennenbaum did not insist on hiring Skadden. Rather, he requested that other firms, in addition to Skadden and Duane Morris, be interviewed. *See* Ex. D to Appendix of Kennedy's Objection to Final Fee Application (5/2/13 Hearing Exhibits); 5/2/13 Hearing Tr. at 50. Feliciano further disclosed that he had "plenty

1. References to "353 B.R. at 835" are citations to the Court's November 17, 2006 Amended Findings of Fact and Conclusions of Law in *The Official Comm. Of Unsecured Creditors of Radnor Holdings Corp. V. Tennenbaum Capital Partners, LLC* (In re Radnor Holdings Corp.) Adv. Pro. No. 06-50909, 353 B.R. 820 (Bankr. D. Del. 2006).

Appendix D

of dealings with Skadden” and that he believed that Skadden’s rates were too high for this assignment. *See* Ex. D to Appendix of Kennedy’s Objection to Final Fee Application (5/2/13 Hearing Exhibits); 5/2/13 Hearing Tr. at 47. In short, as Kennedy was forced to concede at the hearing, Feliciano did not insist that Radnor hire Skadden, but rather requested that Radnor interview additional firms besides Skadden and Duane Morris. *Id.* at 50. This was because Tennenbaum, and Feliciano and Hollander, actively opposed the hiring of Skadden.

19. Williamson, Radnor’s general counsel, also was actively involved in the retention application process. 5/1/13 Hearing Tr. at 72. She received multiple drafts of the Skadden retention application and the Galardi declarations and attended the September 20, 2006 retention hearing in this Court. *Id.* at 74.

20. The Skadden retention application, and the UST’s objection to it, were discussed during board calls before and after every hearing where these matters were scheduled. *See* 5/1/13 Hearing Tr. at 135-36. Kennedy, as well as Williamson, attended all of these board calls. *Id.* at 74-75, 81-82. They asked Galardi if the UST’s objection was well founded and if Skadden would be disqualified. Galardi told them that he believed that the objection was not well founded, that he would be making supplemental disclosures and the substance of the supplemental disclosures. *Id.* at 81-82. Kennedy participated in those board calls. *Id.* at 92. Williamson did as well, and specifically asked what information would need to be contained in the supplemental disclosure. *Id.* at

Appendix D

134. Galardi provided that information to Williamson and the board. *Id.* at 135-36. The supplemental information included the fact that certain Skadden partners invested in Tennenbaum funds. *Id.* at 136. Williamson also attended the court hearings concerning the UST's objection. *Id.* at 82. So did Springel, Tennenbaum's CRO. *Id.*

21. The Court gives no weight to Kennedy's testimony that he asked Feliciano if Tennenbaum had any connections to Skadden and Feliciano provided no response. 5/2/13 Hearing Tr. at 38-39. Given Kennedy's testimony that if he knew more of Skadden's alleged conflicts he would not have voted to hire Skadden (e.g., *id.* at 27), the Court finds that Kennedy lacks credibility in saying he asked a question, received no answer, and did not follow up.

22. At the objection hearing Kennedy testified repeatedly that he was not aware that Skadden Arps did any work for Tennenbaum other than 5 hours of tax advice. In cross-examination, Kennedy testified as follows:

Q I think it was, and is it your testimony that at the end of May 2006 before Skadden was actually retained by the board you understood only that Skadden had provided, you know, several hours of tax-related advice to Tennenbaum that was related to Radnor?

A That's what I was told.

Q Okay. But didn't you understand before Skadden was retained that Skadden had represented TCP in other unrelated matters?

Appendix D

A I have no knowledge of that.

(5/2/13 Hearing Tr. at 43).

Aside from being in conflict with the Galardi's testimony as noted above, there are two reasons why Kennedy's position is not believable. One, it is inconsistent with his subsequent testimony. Specifically:

Q In May, at the end of May, when Mr. Kennedy testified he wasn't aware of any of these things.

A The first time - - to clarify, the first time I was notified of any conflicts at all, *including* the five hours of tax work, was when Patricia Moran contacted my counsel and told me that we were going to need a waiver, and we had already, you know, begun work. (Emphasis added.)

(5/2/13 Hearing Tr. at 43-44).

Two, it is belied by the fact that Kennedy sent an e-mail to Feliciano on May 30, 2006 in which he stated:

I understand that Skadden has represented TCP in other *unrelated matters* in the past and Skadden does not consider them a conflict, however I want to make certain that you would not have a problem with Skadden representing the company if the board chooses them during our process. Please confirm via email so I can reaffirm with Skadden and the other board

Appendix D

members before our meeting tomorrow.
(Emphasis added.)

(Ex. D, p. 13).

That e-mail was sent before the board voted on the retention of Skadden. (5/2/13 Hearing Tr. at 46.)

23. Skadden did not agree that it would not litigate against Tennenbaum. Instead, Skadden secured from Tennenbaum a full waiver of any conflicts posed by Skadden's representation of Debtors that would allow Skadden to be adverse to Tennenbaum and its affiliates, including in any bankruptcy proceeding. *See* Skadden Exhibit 4 (5/2/13 Hearing Exhibits): 5/1/13 Hearing Tr. at 54. Kennedy's allegation that there was a "tacit understanding between Tennenbaum and Skadden that Skadden would not litigate claims against Tennenbaum" is without basis in fact. *Id.* at 57. The purpose of the waiver was to do exactly the opposite. *Id.*

24. Skadden did not shield or attempt to shield Tennenbaum parties from litigation. Rather, Skadden recommended that Radnor's board form a special committee of independent directors, with separate counsel, to investigate Tennenbaum. *See* 5/1/13 Hearing Tr. at 57; *see also* 9/20/06 Hearing Tr. at p. 12; 10/27/06 Hearing Tr. at p. 54. Debtors followed Skadden's advice and with the approval of the Court the special committee engaged the Wilmer Cutler Pickering Hale and Dorr LLP law firm, which investigated Tennenbaum and its conduct, claims and liens. *See* 5/1/13 Hearing Tr. at 63; *see also* Doc.

Appendix D

Nos. 132 (application to retain Wilmer Cutler Pickering Hale and Dorr LLP) and 276 (order authorizing retention of Wilmer Cutler Pickering Hale and Dorr LLP). The special committee, comprised of independent director Paul Finnegan, investigated claims and causes of action against, and the liens securing, Tennenbaum's claims. 5/1/13 Hearing Tr. at 62. The special committee's charge was broad: to "look at all things Tennenbaum-related." *Id.* at 63.

25. In his objection to the Skadden fee application (Doc. # 1993) Kennedy asserts that there was a cozy relationship between Tennenbaum and Skadden. His objection contains numerous assertions in broad generalities but is devoid of specific facts supporting his position. For example, in paragraph 6 of the objection, Kennedy asserts:

Debtors' counsel, and possibly other professional advisers to the Debtors, owed a duty of candor to this Honorable Court, the Debtors and its board of directors, Mr. Kennedy, as well as other creditors in this case. Debtors' counsel breached those duties, in violation of the Bankruptcy Code, applicable Delaware law, the Model Code of Professional Conduct and possibly under the Securities and Exchange Acts of 1934 and the Investment Advisors Act of 1940.

(Doc. # 1993, p. 4).

Appendix D

On October 25, 2006 Debtors filed an objection to the claims of Tennenbaum. (Doc. # 476) The objection was filed by Wilmer Cutler Pickering Hale and Dorr LLP as counsel for the Special Committee of the Board of Directors of Radnor Holdings Corporation and by Skadden as counsel for Debtors. The introduction of the objection, Debtors asserted:

[W]hile reserving the right to further amend this objection: (i) the Debtors object to the \$23.5 million portion of the Tennenbaum Claim based on the Tranche C Loan (defined below) to the extent it is more properly characterized as an equity interest than as a “claim”; (ii) the Debtors object to the same portion of the Tennenbaum Claim -- relating to the Tranche C Loan -- to the extent the Tranche C loan is secured by liens which are avoidable pursuant to section 547(b) of the Bankruptcy Code; and (iii) the Debtors object to entire Tennenbaum Claim -- including to allowance of the Tranche A and B Loans (defined herein) to the extent Tennenbaum received a preferential transfer on account of those Tranche A and B Loans, in accordance with section 502(d) of the Bankruptcy Code. The Debtors reserve the right to amend this objection on any other grounds (including to pursue equitable subordination theories) and to file appropriate adversary proceedings to effectuate the relief sought herein.

(Doc. # 476, p. 6).

Appendix D

This hardly sounds like Skadden had a cosy relationship with Tennenbaum.

26. Skadden did not act simultaneously as counsel for Debtors and Tennenbaum in connection with these Chapter 11 cases. Tennenbaum was not directly or indirectly represented in the Chapter 11 cases by Skadden. Tennenbaum was separately represented by its own counsel, Milbank Tweed and Richards Layton. Debtors, each secured lender and Kennedy all had separate counsel. 5/1/13 Hearing Tr. at 88-89. Kennedy asked Skadden to provide him with a list of possible lawyers to retain for himself, and Skadden did so. *Id.* at 90.

27. Tennenbaum was not shielded from litigation. The official committee of unsecured creditors appointed in these cases (the “Committee”) was granted standing and commenced an adversary proceeding asserting numerous claims and causes of action against Tennenbaum and others. *See* Adv. Pro. No. 06-50909. Coincident with the sale process, and with Court approval, the Committee commenced intensive adversary proceeding litigation and discovery against Tennenbaum by filing an adversary complaint. The 60 page complaint alleged the following causes of action against Tennenbaum and Feliciano, among others:

- recharacterization of Tennenbaum’s tranche A and B investments;
- recharacterization of the Tennenbaum’s tranche C investment;

Appendix D

- equitable subordination of Tennenbaum's tranche A and B investments;
- equitable subordination of Tennenbaum's tranche C investment;
- Tennenbaum's breach of fiduciary duty of care;
- Tennenbaum's breach of fiduciary duty of loyalty;
- Feliciano's breach of fiduciary duty of care;
- Feliciano's breach of fiduciary duty of loyalty;
- Tennenbaum's aiding and abetting breaches of Radnor officers' and directors' breaches of fiduciary duty of care;
- Tennenbaum's aiding and abetting breaches of Radnor's officers' and directors' breaches of fiduciary duty of loyalty;
- avoidance of fraudulent transfers received by Tennenbaum under 11 U.S.C. § 548(a)(1);
- avoidance of fraudulent transfers received by Tennenbaum under 11 U.S.C. § 544;
- disallowance of the Tennenbaum proofs of claim;
- avoidance of Tennenbaum's liens; avoidance of preferential transfers received by Tennenbaum under 11 U.S.C. § 547(b) and

Appendix D

- turnover of avoided transfers received by Tennenbaum.

The Committee's lawyers had four lawyers in attendance at each of the 8 days of the trial. The legal bill for the Committee in that endeavor amounted to approximately \$2 million. On November 16, 2006, the Court entered a lengthy opinion and a judgment against the Committee. The Court ruled against the Committee on each of its asserted causes of action, if such causes of action against Tennenbaum were not withdrawn by the Committee prior to the Court's ruling. *The Official Comm. Of Unsecured Creditors of Radnor Holdings Corp. v. Tennenbaum Capital Partners, LLC (In re Radnor Holdings Corp.)*, 353 B.R. 820 (Bankr. D. Del. 2006), 838, 840, 842, 843, 844-45, 845-46, 846-47, 848-49. The Committee appealed the judgment, but later voluntarily dismissed its appeal.

28. Neither the conduct of Skadden nor Tennenbaum caused Debtors' bankruptcy cases. *See* 353 B.R. at 835 (transactions between Debtors and Tennenbaum did not cause Debtors' bankruptcy cases). These Chapter 11 cases were the result of Debtors' severe liquidity constraints caused by operational shortfalls, natural disasters and defaults under Debtors' prepetition credit agreements. *See* 353 B.R. at 834-36; Sale Order (Doc. # 698) at p. 6.

29. Following Skadden's retention in early June 2006 through mid-July 2006, Radnor explored a full restructuring rather than a sale. 5/1/13 Hearing Tr. at 48. Skadden did not "undermine" these efforts, as Kennedy charges. Rather, one of the first efforts Skadden

Appendix D

undertook when it was retained was to assist in the hiring of an investment banker to “come up with a business plan to shop with financing sources.” *Id.* at 64. The investment banker was Mark Shapiro of Lehman Brothers. *Id.*

30. Any attempt by Kennedy to argue that Skadden orchestrated a conspiracy by steering Radnor to hire Lehman Bros. as a financial advisor because Lehman would be partial to Tennenbaum is belied by the record. Until Lehman’s retention application was filed, Galardi had no knowledge of any past relationship between Lehman and Tennenbaum. 5/1/13 Hearing Tr. at 140.

31. By the end of the second week of July 2006, Radnor had experienced a liquidity crisis and the restructuring preferred by Kennedy had not proceeded. 5/1/13 Hearing Tr. at 48-49. Feliciano of Tennenbaum resigned from the board during this time period. *Id.* at 49. After that resignation, the board held a meeting and determined to explore a sale as “a backup plan in case the restructuring didn’t happen. *Id.*

32. Pursuing a sale was not dictated by Tennenbaum. Indeed, Tennenbaum did not want to make an unsolicited offer to purchase Radnor’s operating business. It was not until Galardi wrote a letter requesting an offer that Tennenbaum made a term sheet offer. 5/1/13 Hearing Tr. at 49. Even then, Tennenbaum was a “reluctant offerer.” *Id.* at 69. *Accord* 353 B.R. at 835.

33. Skadden negotiated strongly against Tennenbaum with respect to the bid procedures. 5/1/13 Hearing Tr. at

Appendix D

66. Galardi referred to this as not only “arm’s length [but] swords length” negotiations. *Id.* at 69. The negotiations were frequently contentious. *Id.* at 96. This is consistent with testimony from Springel that the Court credited at the 2006 trial; he characterized the negotiations as “spirited and arms length.” 353 B.R. at 836. Topics of the contentious negotiations included the stalking horse bid amount and the length of the sale process. 5/1/13 Hearing Tr. at 49, 69. Indeed, Tennenbaum’s counsel, from the Milbank Tweed law firm, thought that the UST’s position that Skadden could not adequately represent Radnor against Tennenbaum was “a little bit humorous because of the history of the negotiations...and the way in which [Galardi] negotiated adverse to Tennenbaum.” *Id.* at 145. Skadden also negotiated to cause Tennenbaum to assume liabilities and to pay administrative expenses so the estate would not be administratively insolvent. *Id.* at 66, 70. The negotiations continued during the bid procedures stage, and “any time [Skadden] had the opportunity to increase the purchase price, [it] did so.” *Id.* at 70; *cf. id.* at 96.

34. Galardi had three or four negotiating sessions where he attempted to get Tennenbaum to credit bid Tranche C of its debt, which would have benefitted Kennedy, who had given a personal guarantee of the Tranche C debt. Tennenbaum declined. *See* 5/1/13 Hearing Tr. at 89. In no way does this show any collusion between Tennenbaum and Skadden. It shows just the opposite - that Tennenbaum and Skadden had an adversarial relationship.

Appendix D

35. Skadden did not wrongfully collude or conspire with Tennenbaum to orchestrate or manipulate these Chapter 11 cases and the sale process for the benefit of Tennenbaum at the expense of Debtors' creditors and equity interest holders, or Kennedy and his affiliates. Tennenbaum did not engage in misconduct, wrongful conduct, fraud, illegal conduct or a breach of fiduciary duty. 353 B.R. at 841; Sale Order at p. 7. Tennenbaum at all times acted in good faith with a view to maximizing Radnor's value to all constituents. 353 B.R. at 841. Tennenbaum never aided and abetted a breach of fiduciary duty. *Id.* at 843. Tennenbaum did not plan to acquire Debtors when it made its initial investment in Debtors, nor at any time thereafter. *Id.* at 829.

36. There was no collusion or conspiracy between Skadden and its affiliates on the one hand, and Tennenbaum or its affiliates on the other in connection with any matter in these Chapter 11 cases. *See, e.g.*, 5/1/13 Hearing Tr. at 64, 69, 88.

37. Skadden was not, as Kennedy contends, "general counsel" to Tennenbaum or its funds. 5/1/13 Hearing Tr. at 116-117.

38. Skadden did not represent Kennedy individually in connection with these Chapter 11 cases, and did not owe attorney-client duties to Kennedy. Skadden did not have any duty to advance Kennedy's personal bankruptcy objectives or preferred chapter 11 plan. Kennedy has admitted that he was separately represented by his own personal counsel in connection with the Chapter 11 cases.

Appendix D

39. Skadden did not independently, or in concert with Tennenbaum, prevent Kennedy from participating in these Chapter 11 cases. 5/1/13 Hearing Tr. at 90-91.

40. Although Kennedy might have preferred an out of court restructuring or chapter 11 reorganization of Debtors, such a restructuring or reorganization was precluded by Debtors' circumstances and DIP financing terms. *See* Sale Order at pp. 5-6.

41. Prior to the Petition Date, Debtors actively marketed their assets, but were unable to consummate a sale or refinancing transaction outside the auspices of bankruptcy court protection (Sale Order at p. 5); the sale procedures approved by the Court were the result of intense arm's length negotiations among Debtors, the Committee, Tennenbaum and the DIP Lenders (*id.*); in the absence of court approval of the sale, Debtors' Chapter 11 cases ultimately would have been a free-fall chapter 11, and Debtors would have been required to begin the piecemeal liquidation of Debtors' assets and businesses, which piecemeal litigation would result in less value for Debtors' creditor constituencies (*id.* at p. 6); emergent circumstances and sound business reasons existed for the sale (*id.*); the sale transactions were in the best interests of Debtors, their estates and creditors, and all parties in interest (*id.*); entry into the APA and consummation of the sale transactions were an exercise of sound business judgment by Debtors and in the best interests of Debtors, their estates and creditors, and all parties in interest (*id.* at pp. 6-7); the APA and sale transactions were negotiated and undertaken by Debtors and Tennenbaum at arms'

Appendix D

length without collusion or fraud, and in good faith within the meaning of section 363(m) and (n) of the Code (*id.* at p. 7); Tennenbaum did not engage in any conduct that would cause or permit the APA or sale transactions to be avoided, or costs or damages imposed, under section 363(n) of the Code (*id.*); there was no evidence of insider influence, improper conduct, fraud or collusion by Tennenbaum or any of its affiliates in connection with the negotiation of the APA and the sale (*id.* at p. 10); approval of the APA and the sale transactions were in the best interests of Debtors, their creditors, their estates, and all parties in interest (*id.* at p. 14); the sale transactions were undertaken by Tennenbaum in good faith, and Tennenbaum was a purchaser in good faith within the meaning of Code section 363(m) and entitled to all of the protections afforded by section 363(m) (*id.* at p. 15).

42. The bankruptcy sale process, deadlines and procedures contemplated by the APA were required by the terms of the Final DIP Order (Doc. # 278) authorizing debtor-in-possession financing and related adequate protection for Debtors' prepetition lenders. The terms of Debtors' debtor-in-possession financing and the Final DIP Order provided funding only for a chapter 11 sale and liquidation process, not a stand-alone restructuring (e.g. a debt-for-equity restructuring that Kennedy might have preferred). The Final DIP Order expressly provided that Debtors' failure to accept a qualified bid for their assets on or before November 20, 2006 would be an event of default. Doc. No. 278 at ¶ 13(a)(iv). The Final DIP Order's terms of adequate protection for Debtors' prepetition lenders required Debtors to adhere to deadlines for court approval

Appendix D

of the sale process, and the procedures and deadlines contemplated by the APA. *Id.* at ¶ 19(f). The Final DIP Order provided that if Debtors did not adhere to the sale process and timely accept a qualified bid for their assets, then their prepetition lenders would be entitled to exercise their nonbankruptcy remedies. *Id.*

43. Following the Sale, Debtors proposed a liquidating chapter 11 plan. At a March 15, 2012 confirmation hearing, counsel for Kennedy asked orally for an adjournment of the hearing and an extension of his time to assert objections to confirmation of Debtors' plan. 3/15/12 Hearing Tr. at pp. 8-9 (Doc. # 1950) Kennedy's counsel asserted at the March 15 hearing that Kennedy needed additional time to hire "special counsel" to get[]up to speed" on certain matter Kennedy allegedly had "uncovered." *Id.* at pp. 8-9. In response, the Court set April 16, 2012 as an extended deadline for Kennedy to file a renewed confirmation objection on any and all grounds he might assert. *Id.* at 21.

44. Counsel for Debtors thereafter agreed to further extend, ultimately for an additional three months until July 10, 2012, Kennedy's time to file a confirmation objection. Doc. # 1966, Exhibits A-D.

45. Despite the extensions of time granted to him by the Court and Debtors and the nearly six years that had already elapsed, Kennedy did not file a confirmation objection. Instead, on July 10, 2012, Kennedy filed a motion to further extend his time to file a confirmation objection (the "Motion to Extend"). (Doc. # 1964).

Appendix D

46. On July 12, 2012, Tennenbaum and Debtors each filed objections to Kennedy's Motion to Extend. On July 15, 2012, the Court denied Kennedy's Motion to Extend, and Kennedy was time-barred from filing any objection to Debtors' plan of liquidation or any other similar pleading in opposition to confirmation of Debtors' plan in the above-captioned cases.

47. On September 10, 2012, this Court entered an order (the "Confirmation Order")(Doc. # 1976) confirming the Modified Second Amended Joint Plan of Liquidation of Radnor Holdings Corporation and Its Affiliated Debtors and Debtors In Possession (the "Plan"). On September 28, 2012 (the "Effective Date"), the Plan became effective.

48. In the Confirmation Order, this Court determined and specifically found and decreed, among other things, that: Debtors proposed the Plan in good faith and not by any means forbidden by law, and Debtors and their respective officers and directors acted in good faith in the negotiation and formulation of the Plan (Confirmation Order at pp. 17-18); Debtors and their respective officers, directors, employees, agents, counsel and other professionals acted in good faith in connection with the solicitation of acceptances of the Plan (*id.* at pp. 22-23); the provisions of the Plan shall bind any claimholder or interest holder, whether or not such holder has accepted the Plan (*id.* at pp. 25); all entities who held, hold or may hold claims against or interests in Debtors are permanently enjoined from taking any action that is inconsistent with the provisions of the Plan (*id.* at pp. 27-28); none of Debtors or their respective present or former attorneys shall have or incur

Appendix D

any liability to any claimholder or interestholder for any postpetition act or omission in connection with, related to, or arising out of, Debtors' Chapter 11 cases, the pursuit of confirmation of the Plan or consummation of the Plan, except for willful misconduct or gross negligence (*id.* at p. 28); and on the effective date of the Plan, the Old Equity Interests (as defined in the Plan) shall be canceled and each holder thereof (e.g., Kennedy) shall not be entitled to, and shall not receive or retain any property or interest in property on account of, such interests (*id.* at p. 32).

49. On November 8, 2012 in accordance with the terms of the confirmed Plan, Skadden filed its Final Fee Application and set an objection deadline of December 26, 2012. On December 26, 2012, Kennedy filed his Motion-Objection *pro se*. (Doc. # 1993) With that pleading, Kennedy purported to object to Skadden's Final Fee Application and seek orders: "setting aside" the Sale Order over six years after it was entered; "revesting" in Debtors' estates the assets sold to the Purchaser (an affiliate of Tennenbaum) pursuant to the Sale Order; invalidating certain releases in the confirmed and consummated Plan; appointing an examiner, trustee and special counsel to conduct an investigation and bring certain causes of action at Kennedy's behest; and other unspecified relief.

50. At all times during these Chapter 11 cases (i) Skadden acted in good faith as counsel to Debtors and (ii) did not hold or represent an interest adverse to Debtors' estates and was disinterested within the meaning of 11 U.S.C. § 327(a).

Appendix D

51. Skadden's Pre-Retention Disclosures and other disclosures made in connection with Skadden's retention as bankruptcy counsel, including Skadden's disclosures with respect to Tennenbaum, were adequate and sufficient.

52. Skadden did not engage in any malpractice, breach of fiduciary duty, fraud, conspiracy, perjury, obstruction of justice or other willful misconduct in connection with the above-captioned Chapter 11 cases.²

**NOW, THEREFORE, THE COURT CONCLUDES
AND HEREBY ORDERS that:**

1. The Kennedy Objection (Doc. # 1993) is **OVERRULED** in its entirety.
2. The Final Fee Application (Doc. # 1989) is **GRANTED**.
3. Debtors are authorized and directed to pay 100% of the fees requested in the Final Fee Application, in the amount of \$3,934,254.50 and 100% of the expenses requested in the Final Fee Application, in the amount of \$305,540.25 minus amounts previously paid.

2. The sale transaction and the confirmed plan resulted in the elimination of Kennedy's equity interest in Radnor. On information and belief, Tennenbaum has undertaken legal action against Kennedy by reason of Kennedy's guarantee on a portion of the debt owed by Radnor to Tennenbaum.

51a

**APPENDIX E — MEMORANDUM ORDER
DENYING SECOND MOTION TO VACATE, IN RE
RADNOR HOLDINGS CORP., CASE NO. 06-10894
(BANKR. D. DEL. MAR. 18, 2015), ECF 2151,
DATED MARCH 18, 2015**

IN THE UNITED STATES BANKRUPTCY
COURT FOR THE DISTRICT OF DELAWARE

Case No. 06-10894
(Jointly Administered)

Re: D.I. 2133

Adv. No. 12-51308

Re: D.I. 94

In re:

RADNOR HOLDINGS CORPORATION, *et al.*,

Debtors,

MICHAEL T. KENNEDY, MTK TRUST
FBO RYAN KENNEDY, MTK TRUST FBO
SEAN M. KENNEDY, MTK TRUST FBO
MICHAELA C. KENNEDY, MTK TRUST
FBO CONNOR R. KENNEDY

Plaintiffs,

v.

Appendix E

SKADDEN ARPS MEAGER & FLOM LLP; SK
PRIVATE INVESTMENT FUND 1998 LLC;
RICHARD T. PRINS, ESQUIRE; GREGG M.
GALARDI, ESQUIRE; TENNENBAUM & CO.
LLC; TENNENBAUM CAPITAL PARTNERS,
LLC; BABSON & CO. LLC; SPECIAL VALUE
EXPANSION FUND, LLC; SPECIAL VALUE
OPPORTUNITIES FUND, LLC; MICHAEL E.
TENNENBAUM; SUZANNE S. TENNENBAUM;
DAVID A. HOLLANDER; MARK K. HOLDSWORTH;
HOWARD M. LEVKOWITZ; RICHARD E.
SPENCER; JOSE FELICIANO; ALVEREZ &
MARSAL, INC. AND STANFORD M. SPRINGEL,

Defendants.

MEMORANDUM ORDER¹

Michael T. Kennedy (“Mr. Kennedy”) is the former CEO, chairman of the board and majority shareholder of debtors Radnor Holdings Corporation, *et al.* Mr. Kennedy, appearing *pro se*, is asking the Court to vacate an order of the Court (the “Motion”).² The ruling at issue is the Court’s

1. The cases were reassigned to Judge Kevin Gross upon the retirement of Judge Peter J. Walsh who had presided over the case from its beginning. See Order of Reassignment of Judge, dated December 10, 2014 [D.I. 2131].

2. Motion for an Order: (I) Pursuant to Fed. R. Civ. P. 60(b)(6) and 60(d)(3) Made Applicable by Fed. R. Bankr. P. 9024, Vacating this Court’s Order Dated June 20, 2013; (II) Invalidating Defendants’ Releases Under the Sale and Confirmation Orders; and (III) Imposing Sanctions Against the Defendants Due to Willful

Appendix E

Memorandum Opinion and Order dated June 20, 2013, Regarding the Objection of Michael T. Kennedy to the Final Fee Application of Skadden, Arps, Slate, Meagher & Flom LLP (the “Fee Order”) [D.I. 2076]. The District Court affirmed the Fee Order. Mr. Kennedy appealed the District Court’s ruling to the Third Circuit Court of Appeals, and the appeal is pending. In the meantime, Mr. Kennedy requested a stay of briefing of the appeal to enable him to proceed here with the Motion. The Court of Appeals granted the request and the Court is now ruling on the Motion.

The Court will avoid the trap of reviewing all of the matters the Court previously addressed in this contentious case pending for almost nine years before Judge Walsh. It is sufficient to explain that Mr. Kennedy continues to allege that Debtors’ attorneys, Skadden, Arps, Slate, Meagher & Flom (“Skadden”) and its secured creditors, the Tennenbaum parties (“Tennenbaum”), engaged in misconduct. Tennenbaum ultimately purchased the Debtors through a credit bid with some of its secured claim, resulting in Mr. Kennedy’s loss of his equity interest in Debtors and a judgment against him in favor of Tennenbaum.

As a preliminary matter, there are two procedural issues which the Court must address. First, the Court

Misconduct Including Interference with the Administration of the Bankruptcy Case and Fraud on the Bankruptcy Court [D.I. 2133, Adv. D.I. 94]. Although the Motion bears the caption of both the main Chapter 11 case and the adversary proceeding, the Motion pertains only to an order entered in the main case.

Appendix E

will take judicial notice of the proceedings before this Court and the District Court. *Newhall Land & Farming Co. v. Am. Heritage Landscape, L.P. (In re LandSource Communities Dev. LLC)*, 476 B.R. 454, 456 n. 2 (Bankr. D. Del. 2012); *Orabi v. Attorney General*, 738 F. 3d 535, 537 n. 1 (3d Cir. 2014); Fed. R. Evid. 201. Second, the Court normally would not have jurisdiction to consider the Motion because the pending appeal divests the Court of jurisdiction. *Sheet Metal Workers Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 198 F.3d 391, 394 (3d Cir. 1999). It is clear that the Court has authority to deny the Motion on the basis that it does not have jurisdiction by virtue of the appeal. Fed R. Civ. P. 62.1(a)(2). The Court understands that the Court of Appeals, with the appeal pending, has in essence asked the Court to decide the Motion and, accordingly, the Court will honor the request.

The Court has carefully reviewed the record of the case and the opinions which the Court and the District Court issued. It is elegantly clear from this review and the Motion itself that the Motion is nothing more than a rehashing of allegations that the Court and the District Court previously ruled had no merit. Mr. Kennedy has not asserted a single new fact or argument which this Court and the District Court did not already consider and reject. Mr. Kennedy candidly concedes that:

The acts of misconduct was [sic] discovered on February 17, 2012 and further revealed in 2013.
(Opening Brief, p.2, n. 3)

Appendix E

In the Motion, Kennedy alleges:

1. Gregg Galardi (“Galardi”), the lead attorney from Skadden, made false statements to the Court at hearings on September 20, 2006 and October 27, 2006, regarding Skadden’s prior representation with Tennenbaum, and failed to disclose Skadden’s relationship with Tennenbaum.
2. In May 2013, Galardi falsely testified on cross-examination regarding Skadden’s interest in the Debtors and work performed by Skadden on behalf of Tennenbaum.
3. The Skadden statements and misrepresentations in filings with and testimony before the Court deceived the Court and therefore the Court approved Skadden’s retention, the Sale Order (approving the sale to Tennenbaum) and the Confirmation Order based upon fraud.

The Court must deny the Motion because the Court (and the District Court) expressly considered and rejected all of Kennedy’s allegations on the basis of evidence presented to and considered by the Court. At oral argument on the Motion, Mr. Kennedy could not point to a single allegation which the Court did not previously consider and reject.

*Appendix E***The Skadden Retention Order**

At the outset of the case, the U.S. Trustee objected to Skadden's retention, arguing that Skadden's relationship with Tennenbaum was a conflict of interest. [D.I. 169]. Judge Walsh held a contested evidentiary hearing on the issue, overruled the objection, and approved Skadden's retention. *See* Sept. 20, 2006 Tr. at 60-62. Judge Walsh determined that Skadden's relationship with Tennenbaum was not significant enough to create a conflict of interest. He also noted that the creditors' committee (the "Committee") and the independent counsel representing Debtors' special committee of the board of directors both were actively involved in the case, such that Skadden could not favor Tennenbaum's interest even if it wanted to. *Id.* at 60-62. As a result, the Court determined that Skadden did not hold a disabling conflict. *Id.* at 61-62 (The Court: "I'm not concerned that Skadden Arps may be influenced in any fashion to not engage in the best representation of the Debtor. . . . I just don't think there's any possibility for Tennenbaum to have a leg up on whatever happens in this case by reason of the Debtor being represented by Skadden Arps.").

After the hearing, the Court entered an order approving Skadden's retention. [D.I. 246]. The Court stated that it was "satisfied with the representations made in the Application and the Galardi Declaration that Skadden, Arps represents no interest adverse to the estates [and] that it is a 'disinterested person' as that term is defined under Bankruptcy Code section 101(14)." *Id.* at 2. No party appealed the Skadden Retention Order, and it is a final order.

*Appendix E***The Sale Opinion and Order**

Two months into the case, the Committee sued Tennenbaum and certain of its affiliates, alleging that Tennenbaum's intent from the beginning of its relationship with Debtors was to acquire the Debtors by "credit bidding" in a bankruptcy fire sale, leaving unsecured creditors with nothing. [Adv. Pro. No. 06-50909, D.I. 1] (Committee Complaint). The Committee sought to avoid Tennenbaum's secured claims to allow unsecured creditors to recover. The Committee alleged:

[I]f Tennenbaum is permitted to consummate its scheme and proceed with its acquisition plan, the unsecured creditors stand to recover nothing. That outcome is by design, the result of a deliberate, coordinated plan by Tennenbaum to increase the debt load of the already over-leveraged debtors, take them into default, and then acquire the Debtors' valuable assets and business operations in a fire-sale process at a discount so steep that it constitutes a constructively fraudulent transfer.

Id. ¶ 1.

Judge Walsh rejected all of the Committee's claims. "The Court conducted eight full days of trial between November 2 and November 14, 2006, heard testimony from fourteen witnesses and admitted more than 350 documents into evidence." *Official Comm. of Unsecured Creditors v. Tennenbaum Capital Partners LLC (In re*

Appendix E

Radnor Holdings Corp.), 353 B.R. 820, 827 (Bankr. D. Del. 2006) (the “November 2006 Opinion”). The Court dismissed the complaint in its entirety, finding that Tennenbaum had no improper motive and committed no wrongdoing in its relationship with Radnor. In particular, the Court determined that:

TCP [Tennenbaum Capital Partners] did *not* engage in misconduct; TCP did *not* seek to benefit itself at the expense of others; TCP did *not* seek to mislead trade creditors, public noteholders or other stakeholders. TCP at all times acted in good faith with a view to maximizing Radnor’s value to all constituents.

Id. at 841 (emphasis in original). The Court also found that Tennenbaum did not control Debtors, Tennenbaum was not an insider, and became a stalking horse and then purchaser only to prevent a freefall into Chapter 7. *See id.* at 829-46.

Based on its findings at trial, the Court soon approved the sale of substantially all of Debtors’ assets to a Tennenbaum affiliate under Bankruptcy Code § 363. *See generally* D.I. 698 (the “Sale Order”). The Court determined that Debtors marketed their assets and conducted the sale in good faith using a fair process, and that the sale represented the highest and best value available. Sale Order H, I, L, N, W & 5. The Court also found that there was no evidence of insider influence or improper conduct by Tennenbaum, and that Tennenbaum had purchased in good faith. *Id.* at W, 5. The Court

Appendix E

further found that Tennenbaum and Debtors negotiated the bid “without collusion or fraud.” *Id.* at N. The Court specifically approved the amount of Tennenbaum’s credit bid (of some but not all of its claim) as “valid and proper”:

At the Auction, pursuant to its agreement under the Purchase Agreement, Purchaser credit bid \$95 million, which credit bid was a valid and proper offer pursuant to the Bid Procedures and Bankruptcy Code sections 363(b) and (k).

Id. at Q. Finally, the Court determined that the inability of Debtors to restructure their debt or reorganize was the result of the existing circumstances and the DIP financing terms, not because of improper conduct by Skadden or Tennenbaum. *Id.* at L.

The Sale Order also contained releases in favor of Tennenbaum, which Mr. Kennedy now asks the Court to invalidate. *See* Sale Order Ex. A (APA) at § 12.11. Mr. Kennedy previously moved to set aside the Sale Order and its releases under Rule 60. Judge Walsh denied that request.

The Confirmation Order

In March 2012, the Court held a hearing to consider confirmation of the Debtors’ Second Amended Plan of Liquidation [D.I. 1946] (the “Plan”). *See* D.I. 1950 (transcript of March 15, 2012 hearing). Mr. Kennedy had filed an objection in February 2010. [D.I. 1806].

Appendix E

At the confirmation hearing, Mr. Kennedy's counsel requested that confirmation be delayed so that Mr. Kennedy could file another objection to the Plan, this one on the basis that some unspecified "impropriety" had occurred. *See* D.I. 1950 at 7 (transcript of hearing). The Court adjourned the hearing and gave Mr. Kennedy thirty days to file a consolidated objection that would supersede his February 2010 objection and that would set forth all of his arguments in one pleading. Mr. Kennedy never filed the objection.

The Court confirmed the Plan in September 2012. No appeal was taken, and the Confirmation Order became a final order. The Confirmed Plan eliminated existing equity interests, including Mr. Kennedy's. [D.I. 1940 at Ex. 1, p. 20, § D].

After plan confirmation, Mr. Kennedy attacked Tennenbaum and Skadden for their alleged misconduct. First, Mr. Kennedy moved to set aside the Sale Order under Rule 60(b) and objected to Skadden's final fee application. [D.I. 1993]. That same day, he also filed a complaint, purportedly on Debtors' behalf, seeking \$300 million in damages and an avoidance of the sale. [Adv. D.I. 1, 6]. As the basis for his motion, objection and complaint, Mr. Kennedy alleged that Tennenbaum and Skadden failed to disclose conflicts of interest to the Court. He also alleged that Tennenbaum and Skadden collaborated to manipulate Debtors' restructuring in Tennenbaum's favor. These are the same allegations that he is once again raising in the Motion.

Appendix E

Judge Walsh denied Mr. Kennedy's request to set aside the Sale Order. Rule 60(b) motions must be brought within one year of judgment, and Mr. Kennedy sought to vacate an order entered six years earlier.

The Fee Order

Mr. Kennedy's objection to Skadden's fee application was not time-barred. The Court therefore scheduled an evidentiary hearing to consider Mr. Kennedy's allegations on the merits. The Court conducted the evidentiary hearing over the course of two days in May 2013. Mr. Kennedy attended those hearings, testified under oath, and was represented by counsel. The hearing took place after Mr. Kennedy learned about the alleged misconduct.

After the hearing, the Court issued the Fee Order, finding there was no merit to Mr. Kennedy's allegations of misconduct. The Court noted that it had already determined, in 2006, that Skadden had made appropriate disclosures and did not hold a conflict of interest. The Court reaffirmed those findings:

Given the full record of Skadden disclosures,
Skadden did not misrepresent its relationships
with Tennenbaum to the Court or the UST.

See Transcript of October 27, 2006 Hearing (Doc. #582).

The Court also relied on its findings in its November 2006 Opinion to reaffirm that Tennenbaum engaged in no wrongdoing:

Appendix E

... Tennenbaum did not engage in misconduct, wrongful conduct, fraud, illegal conduct, or breach of fiduciary duty. . . .There was no collusion between Skadden and its affiliates on the one hand, and Tennenbaum or its affiliates on the other in connection with any matter in these Chapter 11 cases.

Id. at *9 (citing November 2006 Opinion, 353 B.R. at 841 and 843) (emphasis added); *see also id.* at *5 (“Tennenbaum did not control Debtors’ affairs, and no one at Tennenbaum ever exercised control over the Radnor board of directors”) (citing November 2006 Opinion, 353 B.R. at 834- 35). The Court also found that:

Mr. Kennedy knew of Skadden’s relationship with Tennenbaum all along. *Id.* at *4.

Tennenbaum did not choose Skadden as Debtors’ counsel. *Id.* at *5.

Mr. Kennedy already knew that certain Skadden partners invested in Tennenbaum funds. *Id.*

Mr. Kennedy’s testimony that he did not know of Skadden’s relationship with Tennenbaum lacked credibility. *Id.* at *6.

Mr. Kennedy’s testimony that he believed that Skadden did no work for Tennenbaum other than 5 hours of tax work was “not believable.” *Id.*

Appendix E

Mr. Kennedy's allegation that Skadden had a secret deal with Tennenbaum had no basis in fact. *Id.*

Mr. Kennedy appealed the June 2013 Opinion, and the District Court affirmed. *See Kennedy v. Skadden, Arps, Slate, Meagher & Flam LLP (In re Radnor Holdings Corp.)*, --- B.R. ----, 2014 WL 3976701, at *4 (D. Del. Aug. 13, 2014).

The Motion is based on the same underlying events which the Court fully addressed, particularly in the Fee Order. Thus, it is the law of the case that:

The Skadden Retention Order resolved Skadden's purported conflict of interest and failure to disclose.

The November 2006 Opinion resolved Tennenbaum's purported improper scheme in the bankruptcy case to buy Debtors.

The Sale Order resolved Tennenbaum's purported conspiracy with Skadden to purchase Debtors.

The Fee Order resolved and rejected all allegations of wrongdoing by and between Tennenbaum and Skadden.

It is clear to the Court that, dissatisfied by the Court's ruling, Mr. Kennedy is taking a "run" at a newly assigned Judge. By filing the Motion, Mr. Kennedy is, in effect,

Appendix E

asking the Court to review as if on appeal the final rulings made by Judge Walsh. He has not presented a scintilla of new facts or new arguments. It is for the Court of Appeals to review the rulings of the Court and the District Court.

Sanctions

Skadden and Tennenbaum are seeking sanctions against Mr. Kennedy which would include dismissal of his complaint in the adversary proceeding and an order barring Mr. Kennedy from any further filings. Mr. Kennedy has unsuccessfully brought multiple action in various courts. The Court will enjoin Mr. Kennedy from filing any further motions, objections, pleadings or other filings in this Court or others related in any way to any misconduct in the bankruptcy case or Tennenbaum's judgment without leave of the Court during the pendency of the appeal to the Court of Appeals. The injunction is to prevent further disruption of the pending appeal and thus to maintain the status quo. The injunction will also prevent harm to Skadden and Tennenbaum while the appeal is pending from Mr. Kennedy's proclivity for litigation. The Court does not believe it is appropriate to consider the request for additional sanctions while the appeal is pending.

For the foregoing reasons, it is hereby ORDERED that:

1. The Motion is denied.

Appendix E

2. Mr. Kennedy is enjoined from filing in the Court or any other court (except the Court of Appeals) any motion, objection or pleading relating in any way to the subject matter of the Motion and the Tennenbaum judgment without leave of the Court during the pendency of the appeal and for 30 days thereafter.

3. The Court is deferring a ruling on the pending sanctions motions until the Court of Appeals issues a ruling on the pending appeal.

Dated: March 18, 2015 /s/
KEVIN GROSS, U.S.B.J.