

ORIGINAL

IN THE SUPREME COURT OF OHIO

PNH, INC. and RONALD CREATORE)
)
 Appellants,)
)
 vs.)
)
 ALFA LAVAL FLOW, INC.)
)
 Appellee.)

APPEAL NO.: 10-1430

ON APPEAL FROM THE
MAHONING COUNTY COURT,
SEVENTH APPELLATE DISTRICT

REPLY BRIEF OF APPELLANTS,
PNH, INC. AND RONALD M. CREATORE

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LAW AND ARGUMENT

A. Creatore and PNH Have Consistently Argued the Abuse of Process Arose from the Filing of the Adversarial Proceeding and Motion for Injunctive Relief, They Have Never Argued that it Arose from the Filing of the Involuntary Petition.

Creatore and PNH have consistently asserted throughout this case that Alfa Laval's involuntary petition was filed in proper form and with probable cause and that the abuse did not occur until after the involuntary proceeding was filed. In paragraph 25 of its Complaint filed May 5, 2005, Creatore and PNH alleged: "That after filing the petition for involuntary bankruptcy against GO&B, ALF [Alfa Laval] subsequently used that bankruptcy proceeding to initiate an improper proceeding against PNH and Ronald Creatore." [Emphasis, underlining and bracketed text added].

Additionally, Creatore's November 28, 2007 Response to Alfa Laval's Summary Judgment Motion stated: "In this case, it is undisputed that Alfa Laval **set an involuntary bankruptcy proceeding in motion in proper form and with probable cause** against GO&B since GO&B owed Alfa Laval over one million dollars as of April 23, 2003." [Emphasis added]. Even Creatore's expert witness found that the involuntary petition was filed in proper form and with probable cause. (Supp. 142)

Nevertheless, Alfa Laval continues to recast Creatore's claim as a claim for the bad faith filing of the involuntary petition against GO&B. (Response, 1, 9, 11, 19)¹ The case record, in dispositive fashion indicates that Creatore and PNH's cause of action is for the subsequent perversion of the bankruptcy process which occurred in the adversary proceeding **after** the proper

¹ Indeed, such a claim is GO&B's to bring as the bankruptcy debtor. Neither Creatore nor PNH would have any right to such claim. The fact that the GO&B court was led to believe the abuse claim centered on the filing of the involuntary petition is unfortunate, but there was no ruling to that effect, only obiter comment. It should be noted, the GO&B bankruptcy court was only given the opportunity of a few minutes to talk with the parties at the hearing. With due respect to the bankruptcy court, its characterization of the claim as arising from the filing of the involuntary petition is simply wrong.

filing of the involuntary petition.

Alfa Laval has an obvious motive for attempting to reframe this case as a bad faith filing of an involuntary petition. Numerous cases have found that an abuse of process or malicious prosecution claim for the bad faith filing of an involuntary petition is preempted by the Bankruptcy Code. See, e.g. *In Re Miles* (C.A. 9, 2005), 430 F.3d 1083. Additionally, the filing of an involuntary petition is a “core” matter over which bankruptcy courts have exclusive jurisdiction pursuant to 28 U.S.C. § 1334(a).

As established by the record, Creatore and PNH’s claims are based on actions taken by Alfa Laval **after** it filed the GO&B involuntary petition, namely the filing of the adversarial proceeding and the motion for injunctive relief. To prevent Creatore from competing against it, Alfa Laval filed the adversarial complaint in its own name and in the name of the Bankruptcy Trustee. (Supp. 1) Despite naming the Trustee as a plaintiff, the complaint was brought at the insistence of Alfa Laval, was written by Alfa Laval, and was executed only by Alfa Laval’s attorney. Alfa Laval knew it could not file the complaint itself because it had no covenant not to compete with Creatore. Instead, it usurped or hijacked the apparent standing of the Trustee, naming him as a plaintiff with the rights to assert GO&B’s covenant not to compete against Creatore. Alfa Laval filed the adversarial complaint without the signature of the Trustee or the signature of an attorney on behalf of the Trustee.

An abuse of process claim requires a showing that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed. *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St. 3d 265. Procedurally, the claims seeking to stop Creatore from competing could only be brought by an interim trustee as the representative of the debtor, GO&B, with the bankruptcy court’s permission. Considering that Alfa Laval was not the proper party to

bring the claims in the adversarial complaint, it is not surprising that Alfa Laval violated and perverted bankruptcy rules and procedures in its misguided quest to file it.

B. Creatore and PNH's Claims Against Alfa Laval Arose from Violations of "Non-Core" Bankruptcy Rules and Procedures Committed by Alfa Laval In the Filing of the Adversarial Complaint and Motion for Injunctive Relief.

Contrary to its assertions, Alfa Laval's violations were strictly procedural violations, not substantive violations or violations of "core" bankruptcy law. The infringements entailed Alfa Laval ignoring or outright violating the **Rules of Bankruptcy Procedure**. Under the authority of 28 U.S.C. § 2075, the U.S. Supreme Court promulgated the Rules of Bankruptcy Procedure. 28 U.S.C. § 2075 states in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right. [Emphasis and underlining added].

Rule 1001 of the Rules of Bankruptcy Procedures defines the scope of the rules, stating:

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding. [Emphasis and underlining added].

In *In re Hanover Indus. Mach. Co.* (E.D. Penn. 1986), 61 B.R. 551, 552, the court stated: "As a general matter, the Code defines the creation, alteration or elimination of substantive rights*** the Bankruptcy Rules define the process by which these privileges may be effected." As consistently argued by Creatore and PNH, in abusing the bankruptcy process, Alfa Laval did not violate "core" or "substantive" provisions of the Bankruptcy Code. Instead, it violated or ignored procedural rules, namely, the Rules of Bankruptcy Procedure. By statutory definition, these rules do not "abridge,

enlarge, or modify any substantive right” they merely “define the process by which the privileges [substantive rights] may be effected.” 28 U.S.C. § 2075 and *In re Hanover*, 61 B.R. at 552. [Bracketed text added.]

In the instant case, it is these procedural provisions that Alfa Laval either ignored or violated. Most notably, Alfa Laval violated Rule 9011 of the Federal Rules of Bankruptcy Procedure. Rule 9011(a) requires “[e]very petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney’s individual name. A party who is not represented by an attorney shall sign all papers.” The adversarial complaint was not signed by the Trustee or any attorney of record on his behalf. (Supp. 13) By proceeding without the Trustee’s signature, Alfa Laval was able to present claims against Creatore and PNH without the Trustee certifying that the allegations therein meet the standards of reasonable inquiry and good faith as required under Rule 9011(b). As established in *Creatore and PNH’s* Supreme Court brief, FRBP 9011 (b) is a provision borrowed from Rule 11 of the Federal Rules of Civil Procedure and the substance of its provisions are not unique to bankruptcy.

While in the process of violating FRBP 9011, Alfa Laval ignored and thus violated other Bankruptcy Rules as well. Bankruptcy Rule 2001(b) requires that the party moving for the appointment of an interim trustee post a bond prior to the appointment. Failure to post the Rule 2001(b) bond means that “[a]n interim trustee may not be appointed” under 11 U.S.C § 303(g). As movant for the appointment of the interim trustee, Alfa Laval failed to post the requisite bond. Therefore, no party involved, including the Trustee, had authority to file the adversarial complaint.

Finally, the Trustee, then only an interim trustee, needed the bankruptcy court’s permission to file the adversarial complaint. As an interim trustee appointed prior to the entry of an order for relief, the Trustee’s authority was limited to the duties set forth by the court’s order appointing him.

Bankruptcy Rule 2001(c) of the Rules of Bankruptcy Procedure serves to limit the scope of an interim Trustee's authority by stating that "the order directing the appointment of an interim trustee shall state the reason the appointment is necessary and shall specify the trustee's duties." The order of appointment issued in the GO&B bankruptcy did not grant the interim Trustee the authority to file the adversary proceedings. Any act of the interim Trustee other than "to take possession of the property of the estate and to operate the business of the debtor" would have required further court approval pursuant to Bankruptcy Rule 2001(c). The title of "interim" was not formally removed until the August 13, 2003 Meeting of Creditors, some ten weeks after the improper filing of the adversarial proceeding. By filing the adversarial complaint on behalf of the Trustee, Alfa Laval not only usurped the Trustee's authority, but also purported to the Trustee authority the Trustee did not have.

The above listed violations are all procedural in nature not substantive or "core" bankruptcy matters as suggested by Alfa Laval. Alfa Laval's violations of the Rules of Bankruptcy involve the mechanisms for how and by whom the adversarial claim could have been brought. These rules by statutory definition of 28 U.S.C. §2075 and Rule 1001 are not "core" matters and do not invoke any substantive bankruptcy rights.

C. There is a Standard Test for Determining a Bankruptcy Court's Jurisdiction Under 28 U.S.C. § 1334(b).

Alfa Laval suggests that there is no bright line test for what is a "core" proceeding. (Response, 16). However, for what is relevant in the instant case, procedural violations of bankruptcy rules and procedures, 28 U.S.C. § 1334 (b), 28 U.S.C. § 2075 and Rule 1001 provide as bright of a line as is needed. In support of its position, Alfa Laval cites *In Re Cano* for the proposition that "courts have not precisely defined what matters fall within a court's 'arising under'

and ‘arising in’ jurisdiction.” (S.D. Texas, 2009), 410 B.R. 506, 545. However, a review of *Cano* reflects that its finding is not relevant to the jurisdictional issues presented in this case under 28 U.S.C. § 1334(b). The instant case is concerned with “related to” jurisdiction. According to 28 U.S.C. § 1334(b), “the district courts shall have original but not exclusive jurisdiction of all civil proceedings **arising under** title 11, or **arising in** or **related to** cases under title 11.” [Emphasis Added]. According to the Sixth Circuit’s decision in *In re Wolverine Radio Co.*:

For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between the second, third, and fourth categories (proceedings “arising under,” “arising in,” and “related to” a case under title 11). These references operate conjunctively to define the scope of jurisdiction. Therefore, **for purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least “related to” the bankruptcy.** (C.A. 6, 1991), 930 F.2d 1132, 1141. [Emphasis Added, Internal Citations Omitted].

The Sixth Circuit went on to provide the “uniformly adopted” definition of “related to” jurisdiction:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.* Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate. *Wolverine*, 930 F.2 1141-42.

Differentiating between the standards of “arising under”, “arising in” and “related to” only becomes relevant for the scope of a bankruptcy court’s jurisdiction under 28 U.S.C. § 157. According to 28 U.S.C. § 157(b)(1), bankruptcy courts can “hear and determine all cases under title 11 and all core proceedings **arising under** title 11, or **arising in** a case under title 11...” [Emphasis Added]. However, under 28 U.S.C. § 157(c) a bankruptcy court’s power is limited to submitting

proposed findings of fact and conclusions of law to the district court for non-core proceedings that are otherwise just “related to” a case under title 11. Therefore, *Cano*’s finding that there are no precise definitions of “arising under” and “arising in” is of no concern here where the only relevant inquiry is whether the civil proceeding is “related to” a case under title 11. As stated more fully by Creatore and PNH in the Merit Brief, the claims at issue here fail the “related to” test because they do not affect the property of the estate or its administration. As such, the bankruptcy court in this case would have no jurisdiction at all, let alone “core matter” jurisdiction.

D. The Standard Tests for Determining a Bankruptcy Court’s Jurisdiction Under 28 U.S.C. § 1334(b) and Determining “Core Matters” Have Been Applied to Support State Court Jurisdiction Over Causes of Action Related to a Bankruptcy Trustee’s Abuse of Authority.

Alfa Laval argues that its usurpation of the Trustee’s authority is a substantive or “core”/“custom built” bankruptcy matter. (Response, 15) In support of its argument, Alfa Laval cites to 11 U.S.C. § 704 “Duties of Trustee” and 11 U.S.C. § 324 “Removal of Trustee or Examiner.” (Response 15, 17). Other than citing to the two Bankruptcy Code sections, the only other authority Alfa Laval provides in support of this argument is a general citation to two cases that discuss the general role of the bankruptcy trustee, *In re AFI Holdings, Inc.* (C.A. 9, 2006), 355 B.R. 139 and *Matter of Schoen Enterprises, Inc.* (M.D. Fla. 1987), 76 B.R. 203. Alfa Laval provides no support or citation for its conclusion that a trustee’s authority is a “core” or substantive matter. (Response 17)

First, Alfa Laval’s position in this regard is premised upon an improper analogy. It wrongly presumes the trustee’s authority is being litigated. The referenced code sections, citations and unsupported conclusions would only be relevant if the Trustee were a party to this case. He is not. The claims made by Creatore and PNH are against Alfa Laval. The Bankruptcy Code provides no

remedy for Alfa Laval's abuse of process. Indeed, Alfa Laval could not have been removed as trustee under 11 U.S.C. § 324, nor was Alfa Laval required to act as fiduciary of the estate as set forth in *AFI Holding*. 355 B.R. 139. Simply put, Alfa Laval was acting in its own self-interest to eliminate Creatore as a competitor – not for the benefit of the estate as a trustee is obligated to do. The authority of the Trustee and the rights and remedies thereunder are not at issue in this case. Rather, this case centers around Alfa Laval's actions.

Second, Alfa Laval's argument that a trustee's authority is a "core" matter is not supported by relevant case law. In cases filed directly against bankruptcy trustees, courts have applied the traditional "related to" standard and found that such claims are not even "related to" the bankruptcy, let alone "core" matters. If the claims brought here were being brought directly against the Trustee, Creatore and PNH could still proceed against the Trustee.

According to *In re Reich*, a party is not required to obtain the bankruptcy court's permission before filing suit against a trustee:

The only statutory provision which deals with this subject says simply that: "the trustee in a case under this title has capacity to sue and be sued." 11 U.S.C. § 323(b). **Court approval is not mentioned as a prerequisite to such capacity. The implication is that none is required.** (E.D. Mich. 1985), 54 B.R. 995, 997-98. [Emphasis added].

Additionally, claims that are brought directly against a bankruptcy trustee arising from the trustee's abuse of authority are put to the same "related to" test and consideration of "core matter" as any other civil proceeding. In *In re Happy Hocker Pawn Shop, Inc.*, a bankruptcy trustee was sued for acting outside the scope of his authority. (C.A. 11, 2006), 212 Fed. Appx. 811. The trustee closed down a third-party pawn shop, M.J.O. Holding Corp. ("M.J.O."), upon the mistaken belief that it held the debtor's property. *Id.* at 812-3. The *Pawn Shop* court permitted M.J.O. to sue the trustee in state court because the bankruptcy court determined that it lacked jurisdiction to hear the case. *Id.* at

814. The trustee objected and argued that M.J.O.'s claims should remain under the bankruptcy court's jurisdiction. *Id.*

The Eleventh Circuit applied the standard "related to" test - "whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy" - to determine whether M.J.O.'s claims against the trustee were "related to" the bankruptcy case. *Id.* at 817. The court found that M.J.O.'s claims were not "related to" the bankruptcy even though they arose from the trustee's actions in the bankruptcy because the damages would not be paid out of the bankruptcy estate. *Id.* at 818. The claims were filed against the trustee in his individual capacity and the estate would derive no benefit even if the trustee successfully defended himself against the claims. *Id.* The Eleventh Circuit also found that matters concerning a Trustee's authority are not "core matters" because they do not invoke substantive rights. *Id.* at 817. In so holding, the Eleventh Circuit cited the Fifth Circuit's decision in *In re Wood* (C.A. 5, 1987), 825 F. 2d 90, stating:

Moreover, as we cautioned in *Toledo*, **a core proceeding must always implicate property of the bankrupt estate.** [Citations omitted]***Accordingly, the complaint the appellees wish to file in state court could never qualify as a "core proceeding" of HHPS's bankruptcy estate because it alleges tortious actions [by the bankruptcy trustee] against property that is not part of the bankruptcy estate. *Pawn Shop*, 212 Fed. Appx. at 816-17. [Emphasis and bracketed language provided].

The Third Circuit stated the same reasoning in *In re Guild and Gallery Plus, Inc.* (C.A. 3, 1996), 72 F.3d 1171. In *Guild*, a bankruptcy trustee was sued for negligence in failing to preserve property under bailment with the debtor: "As previously mentioned, the Summertime painting was not the property of the bankrupt estate. **'If the action does not involve property of the estate, then not only is it a noncore proceeding, it is an unrelated matter completely beyond the bankruptcy court's subject-matter jurisdiction.'** *In re Gallucci*, 931 F.2d 738, 742 (11th Cir.1991)." [Emphasis added].

The instant case is even further removed from bankruptcy than these cases. Those claims were filed against bankruptcy trustees for their improper actions occurring in and, by virtue of their role as a trustee in a bankruptcy. Here, Creatore and PNH are pursuing a private party, Alfa Laval, for abuse of process. They are not suing the bankruptcy Trustee. Additionally, the Trustee here testified before the bankruptcy court and the bankruptcy court made final rulings that the instant litigation has no affect on the assets or administration of the GO&B bankruptcy estate. (Supp. 260 and Appx. 28) Because the claims asserted here do not implicate property of the estate, they fail the “related to” test and the claims cannot be “core.” As such, the bankruptcy court has no jurisdiction to hear the claims pursuant to 28 U.S.C. § 1334. Consequently, state courts are the only appropriate forum for such claims. Congress could not have logically intended for bankruptcy law to preempt legal claims that a bankruptcy court does not even have jurisdiction to hear.

E. Alfa Laval Ignored the Strong Presumption Against Preemption and Offered No Analysis of Congressional Intent.

In its brief, Alfa Laval makes a curious statement that, “For the first time, Appellants now concede that federal bankruptcy law preempts at least some kinds of state law claims.” (Response 10) However, Creatore and PNH have never argued that the Bankruptcy Code has no preemptive effect. Such an argument would ignore the Supremacy Clause. Rather, Creatore and PNH have merely argued that the scope of the Bankruptcy Code’s preemption does not reach the claims at issue here.

Determining the scope of preemption begins with a presumption of no preemption. *Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470, 485-6, 116 S.Ct. 2240; *Bates v. Dow Agrosciences, LLC* (2005), 544 U.S. 431, 449, 125 S.Ct. 1788. Alfa Laval has wholly ignored the strong presumption against preemption. Furthermore, it is a strong presumption because it can only be

defeated by “clear and manifest” congressional intent to rebut. *Id.* Despite this clear U.S. Supreme Court mandate, the court of appeals incorrectly held that the *Bates* standard did not apply to the Bankruptcy Code because a different federal law was at issue. (Appx. 21) Which federal law the U.S. Supreme Court was applying its preemption standard to is of no consequence. The appellate court here erred in failing to apply the strong presumptions from *Medtronic* and *Bates* to the claims at issue. Alfa Laval provided no explanation for this critical error.

While Alfa Laval did give some “lip service” to the importance of congressional intent, conspicuously absent from its brief is any discussion on what the congressional intent is for the claims at issue here. In contrast, Creatore and PNH’s brief contained considerable analysis of why Congress did not intend for the Bankruptcy Code to preempt the claims at issue here. Alfa Laval failed to even remotely address or rebut this analysis.

F. Alfa Laval’s Attempt to Discredit *Graber v. Fuqua* is Without Merit.

Alfa Laval attempted to distinguish *Graber v. Fuqua* from the within matter. (Response 10) In *Graber*, the Texas Supreme Court rejected the argument that allowing a state tort claim for malicious prosecution would interfere with bankruptcy uniformity. (2009), 279 S.W.3d 608, 617.

In *Graber*, Thomas Graber (“Graber”) and his law firm, Hopkins & Sutter, filed an adversary proceeding on behalf of their client, Sunbelt Savings, FSB (“Sunbelt”), alleging that the debtor, Richard Fuqua (“Fuqua”) defrauded Sunbelt in a real estate transaction. *Id.* at 610. After a favorable ruling on the adversarial complaint, Fuqua brought a state tort claim for malicious prosecution against Graber. *Id.* One element of Fuqua’s malicious prosecution claim was whether the adversarial complaint’s fraud claim was brought with probable cause. *Id.* at 617. The *Graber* court explored two possible scenarios for Fuqua to prove that no probable cause existed; one required interpreting the Bankruptcy Code and the other did not. *Id.* at 617-8.

Alfa Laval suggests the instant case is distinguishable from *Graber* because the “crux” of Creatore and PNH’s abuse of process claim involves an abuse of federal bankruptcy procedure. Alfa Laval, therefore, presumably argues that there is no scenario where the abuse can be proven without invoking bankruptcy law. (Response, 10-11). *Graber*, however did not find the mere possibility of proceeding without invoking federal law dispositive in its preemption analysis. While *Graber* found there was a scenario that allowed Fuqua to proceed with his malicious prosecution claim without ever invoking federal law, the court did not require that the case proceed down that path to avoid a threat to bankruptcy uniformity. More importantly, *Graber* found that “the mere existence of Congress’s power to enact uniform bankruptcy laws does not require that Congress actually exercise the power to abolish by preemption all disparate state laws affecting bankruptcy.” *Id.* at 619, citing *Ry. Labor Executives’ Ass’n v. Gibbons* (1982), 455 U.S. 457, 469, 102 S.Ct. 1169. In other words, “because Congress has yet to actually exercise its power to unify this aspect of bankruptcy and suppress the disparate state laws of malicious prosecution, the uniformity argument does not warrant preemption.” *Graber*, 279 S.W.3d 620. The same is true of abuse of process.

Finally, the *Graber* court put to rest the underlying cynicism implied by those such as Alfa Laval that state court judges are not capable of dealing with the highly complex laws of bankruptcy. (Response 20) With regard to this contention, the *Graber* court held: “[t]here is no more reason to question a state court’s aptitude at applying federal law now than there has been for the last two hundred years.” *Id.* at 619.

G. MSR Exploration Provides Little, if Any Support for Alfa Laval’s Position.

Alfa Laval principally relies on *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (C.A. 9, 1996), 74 F.3d 910. The issue before *MSR Exploration* was whether a state law claim for malicious prosecution arising from a creditor’s claim was preempted. *Id.* at 911. The filing and allowance of a

creditor's claims is unquestionably a "core" proceeding under 11 U.S.C. § 501 – 503, and the reasoning Alfa Laval cited from *MSR Exploration* clearly demonstrates that the court was analyzing a "core" matter.

Alfa Laval starts with *MSR Exploration's* finding that 28 U.S.C. § 1334(a) gives "bankruptcy jurisdiction exclusively in the district courts." *Id.* at 913. As previously demonstrated, 11 U.S.C. § 1334(a) deals with "core matters" over which the bankruptcy court has exclusive jurisdiction. Congress expressly gave **concurrent** jurisdiction to the state courts for "related to" or "non-core" matters pursuant to 28 U.S.C. 1334(b).

Alfa Laval then quotes a select portion of a passage from *MSR Exploration*. A review of the entire quote actually shows that even *MSR Exploration* recognized the distinction between "core" versus "non-core" matters:

First, Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts as initial matters. 28 U.S.C. 1334(a). **The mere fact that exclusive jurisdiction over a particular action is in the district courts would not necessarily mean that a later malicious prosecution action must be brought there. However, it does militate in that direction.**

Second, in a related vein, a mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, demonstrates Congress's intent to create a whole system under federal control which is designed to **bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike. While it is true that bankruptcy law makes reference to state law at many points, the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal.** It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process.

Debtors' petitions, creditors' claims, disputes over reorganization plans, disputes over discharge, and innumerable other proceedings, would all lend themselves to claims of malicious prosecution. Those possibilities might gravely affect the already complicated processes of the bankruptcy court. *Id.* at 914. [Footnote omitted and emphasis and underlining added].

MSR Exploration recognized that just because a “particular action” is exclusively in the bankruptcy court’s jurisdiction does “not necessarily mean that a later malicious prosecution must be brought there.” The *MSR Exploration* court merely indicated that it “militates in that direction.” The court then began to draw a line between “core” and “non-core” matters. *MSR Exploration* recognized that the Bankruptcy Code incorporates and references state law, but differentiated between the uniquely “core” matters that are involved to “adjust the rights and duties of creditors and embarrassed debtors alike.” *MSR Exploration*’s own list of bankruptcy matters (“petitions, creditor’s claims, disputes over reorganization plans, disputes over discharge”) are all “core” matters that “adjust all the rights and duties” of debtors and creditors. The above highlighted portions of *MSR Exploration* reveal that the court was keenly aware of the differences between “core” matters and “non-core” matters. The excerpts leave open the possibility, perhaps likelihood, that even the *MSR Exploration* court would not preempt matters like those in the instant case that do not belong to the exclusive jurisdiction of the district court and do not “adjust any rights between debtors and creditors.”

H. The Balance of the Substantive Case Law Cited by Alfa Laval Supports Creator and PNH’s Position that Congress Only Intended that the Bankruptcy Code Preempt “Core” Bankruptcy Matters.

The “core” nature of the issues presented in each of Alfa Laval’s supporting cases destroys the precedential value of those cases. Each and every case listed by Alfa Laval that found preemption, preempted claims arising from a “core” bankruptcy matter: *Pertuso v. Ford Motor Credit Co.* (C.A. 6, 2000), 233 F.3d 417, (violation of the automatic stay and discharge/reaffirmation issues); *Raymark Indus, Inc. v. Baron* (E.D.Pa. June 23, 1997), No. 96-7625, unreported (filing of an involuntary petition); *Koffman v. Osteoimplant Technology, Inc.* (D. Md. 1995), 182 B.R. 115

(filing of an involuntary petition); *Glannon v. Garrett & Associates, Inc.* (D. KS. 2001) 261 B.R. 259 (filing of an involuntary petition); *Mason v. Smith* (1996), 140 N.H. 696 (filing of an involuntary petition); *Smith v. Mitchell Const. Co. Inc.* (1997), 225 Ga.App. 383 (violation of the automatic stay); *Edmonds v. Lawrence National Bank & Trust Co., N.A.* (1991), 16 Kan.App.2d 331 (effect of discharge); and *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien* (2006), 589 Pa. 296 (effect of discharge).

The same is true for *In re Miles* (C.A. 9, 2005), 430 F.3d 1083. The *Miles* case centered on the preemptive effect of 11 U.S.C. § 303(i), which provides specific remedies for a debtor who is the victim of a bad faith filing of an involuntary petition. *Miles* found state court claims arising from the bad faith filing of an involuntary petition were preempted, holding that 11 U.S.C. § 303(i) provides “the exclusive basis for awarding damages predicated upon the filing of an involuntary petition.” *Id.* at 1089. The filing of the involuntary petition is unquestionably a “core” matter. Additionally, it would appear that 11 U.S.C. § 303(i) could serve as the basis for “express” or at least “conflict” preemption for claims arising from the filing of an involuntary petition as opposed to the general “field” preemption argued by Alfa Laval here.

Alfa Laval attempts to find support for preemption by quoting the following passages from

Miles:

We do not hold that all state actions related to bankruptcy proceedings are subject to the complete preemption doctrine. We recognize that “because the common law of the various states provides much of the legal framework for the operation of the bankruptcy system, it cannot be said that Congress has completely preempted all state regulation which may affect the actions of parties in bankruptcy court.” *Koffman v. Osteoimplant Tech. Inc.*, 182 B.R. 115, 124 (D.Md. 1995). However, “remedies and sanctions for improper behavior and filings in bankruptcy court... are matters on which the bankruptcy code is far from silent and on which uniform rules are particularly important.” *Id.* Therefore, we hold that 11 U.S.C. § 303(i) completely preempts state tort action for damages predicated upon the filing of an involuntary bankruptcy petition.

It is for Congress to decide what penalties are appropriate for use in connection with the bankruptcy process, when those penalties shall be utilized, and who may benefit from them.*** If individuals, such as Appellants, are not satisfied with the remedies available under the Bankruptcy Code, they should look to Congress, not the state courts, to supplement the available remedies... *Miles*, 430 F.3d at 1092.

These paragraphs speak directly and specifically to 11 U.S.C. § 303(i) and the specific procedures and remedies Congress provides therein for bad faith filings of involuntary petitions. Even, *Koffman v. Osteoimplant Tech. Inc.* cited by *Miles*, concerned the bad faith filing of an involuntary petition and the remedies available under 11 U.S.C. § 303(i). *Koffman*, 182 B.R. 124. This reasoning, as *Miles* notes, does not apply to “all state regulation which may affect the actions of parties in bankruptcy court.” Indeed, as to those matters where a federal remedy such as 11 U.S.C. § 303(i) exists, it is more likely preemption will apply. However, as is the case here, no federal remedy exists. Recall that our U.S. Supreme Court has indicated that there is an increased likelihood Congress did not intend preemption where it has failed to provide any federal remedy for persons harmed by such conduct. *Silkwood v. Kerr McGee Corp.* (1984), 464 U.S. 238, 251, 104 S. Ct. 615. Moreover, preemption does not occur where the state law causes of action support the federal law, by providing remedies or additional “causes to comply.” *Medtronic*, 518 U.S. 513. Abuse of process supports Rule 9011 in this manner.

Miles does not lead to the conclusion that any abuse of bankruptcy process is preempted, rather, that preemption is warranted only when the Bankruptcy Code provides specific procedures and remedies for an abuse like those found in 11 U.S.C. § 303(i). Considering the Bankruptcy Code is silent on the procedures and remedies for the abuse suffered by Creatore and PNH, *Miles* would likely find that preemption is not warranted here.

Alfa Laval also suggests that *Koffman* provides alternative remedies for improper filings. Of note, Alfa Laval cites *Koffman* for the proposition that 11 U.S.C. § 105 provides a bankruptcy court authority to issue “any type of order, whether injunctive, compensative or punitive...” (Response, 15) *Koffman* provides no such quote or similar statement regarding compensatory or punitive damages and Alfa Laval provides no page number for it in *Koffman*. Even if *Koffman* did hold that 11 U.S.C. § 105 provided such authority, it would be contrary to cases holding that the powers under 11 U.S.C. § 105 are equitable in nature, not remedial. *Matter of Saybrook Mfg. Co., Inc.* (C.A. 11, 1992), 963 F. 2d 1490, 1495. It would also be contrary to the law regarding the same in the Sixth Circuit. In *Pertuso*, the Sixth Circuit stated: “Section 105 undoubtedly vests bankruptcy courts with statutory contempt powers, **but it does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law[.]**”, 233 F.3d at 423 [Internal citation omitted and emphasis added].

The cases cited by Alfa Laval do not conflict with the “core”/“custom built” analysis proposed by Creatore and PNH and followed by *Graber*. A review of the cases cited by Alfa Laval reveals that each case concerning a “core” matter was properly preempted by the Bankruptcy Code, while the “non-core” matter before *Graber* was not.

CONCLUSION

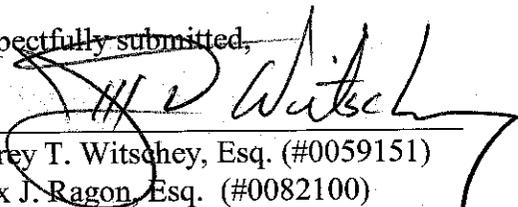
Preemption analysis begins with a presumption that federal law does not preempt state law. This presumption is only rebutted if there is “clear and manifest” congressional intent to do so. *Medtronic*, 518 U.S. at 485; *Bates*, 544 U.S. at 449. The Bankruptcy Code is designed to provide honest debtors with a fresh start, not an opportunity to litigate abuse of process claims between two non-debtors. Considering the purpose of the Bankruptcy Code, it is unlikely that Congress intended preemption here.

Alfa Laval wholly ignored the preemption standard in favor of repeating its same argument that the Bankruptcy Code preempts the claims here for the simple reason that the Bankruptcy Code is “highly complex.” (Response 10, 12, 16, 20) Preemption is not applied for the simple reason that a federal law is “highly complex”, as most federal laws would probably meet that standard. Instead the U.S. Supreme Court requires a detailed analysis of congressional intent. In *Graber*, The Texas Supreme Court conducted precisely this type of analysis and the same should be followed here. When claims involve “core” or “custom built” areas of the Bankruptcy Code, Congress likely intended for such claims to be preempted. However, where Congress merely imported general federal procedures like Rule 9011 and 11 U.S.C. § 105, it is unlikely that Congress intended state law remedies that support those provision to be preempted.

Finally, all of the case law cited by Alfa Laval is distinguishable from the instant case because each relates to a “core” bankruptcy matter. The instant case deals only with abuse of the bankruptcy process that occurred through the violation of non-core, non-substantive bankruptcy rules and procedures.

Accordingly, the decision of the Seventh District Court of Appeals must be reversed and this cause remanded thereto for a ruling on the issues it previously found moot.

Respectfully submitted,



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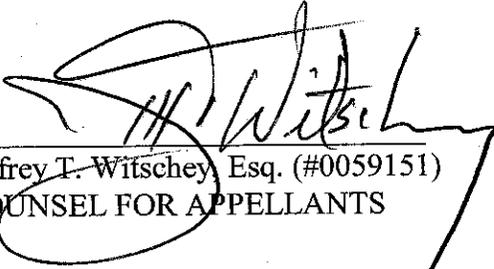
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