No. 07-2360

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE: ETOYS, INC.
Debtor

ROBERT K. ALBER

Appellant

v.

MORRIS NICHOLS ARSHT & TUNNELL, et al.

Appellees

On Appeal from the United States District Court for the District of Delaware

BRIEF OF APPELLEE THE UNITED STATES TRUSTEE

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

United States Trustees are officials of the Department of Justice appointed by the Attorney General to supervise the administration of bankruptcy cases and trustees. *See* 11 U.S.C. §§ 581-589; *United States Trustee v. Revco, D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 499 (6th Cir. 1990) ("[t]he United States trustee, an officer of the Executive branch, represents ... [the] public interest."). As a governmental party, the United States Trustee is not required to submit a statement pursuant to Fed. R .App. P. 26.1.

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STATEMENT OF JURISDICTION

This appeal involves a core proceeding (as defined in 28 U.S.C. § 157(b)(2)) arising under title 11 of the United States Code, over which the United States Bankruptcy Court for the District of Delaware had jurisdiction pursuant to 28 U.S.C. § 157(b)(1). The United States District Court for the District of Delaware had jurisdiction over Appellant Robert K. Alber's appeal from the bankruptcy court's October 4, 2005 order pursuant to 28 U.S.C. § 158(a)(1), as it was an appeal from a final order of the bankruptcy court. Mr. Alber timely filed a notice of appeal of the district court's February 27, 2007 final order dismissing his appeal to the district court. Accordingly, this Court has jurisdiction over Mr. Alber's appeal pursuant to 28 U.S.C. § 158(d).

STATEMENT OF ISSUE PRESENTED

Did the district court abuse its discretion in dismissing Mr. Alber's appeal for failure to prosecute after he disobeyed three orders establishing deadlines for him to file his opening appeal brief?

STATEMENT OF THE CASE

Appellant Robert K. Alber appeals from the district court's dismissal with prejudice of his appeal from a final bankruptcy court order which, among other things, (i) approved the settlement of the United States Trustee's motion for sanctions against the law firm of Traub Bonacquist & Fox ("TBF") and (ii) to the extent Mr.

Alber sought relief beyond that provided in the settlement between the United States Trustee and TBF, denied Mr. Alber's motion for an order disqualifying TBF, TBF's partners, and plan administrator Barry Gold and directing them to disgorge all compensation received in the chapter 11 bankruptcy case of eToys, Inc. (collectively with its debtor affiliates, the "Debtor").[1/]

Mr. Alber disobeyed the district court's scheduling orders dated September 22, 2006, October 23, 2006 and January 5, 2007, directing him to file his opening brief. Dist. D.I. 28, 39 and 44, respectively.[2/] After Mr. Alber failed to comply with the October 23, 2006 scheduling order, TBF, MNAT, and Mr. Gold moved to dismiss Mr. Alber's appeal for failure to prosecute it. Motion to Dismiss, Dist. D.I. 42. Mr. Alber did not oppose the motion to dismiss. On February 27, 2007, after Mr. Alber failed to timely comply with a third order establishing a deadline for him to file his opening brief, the district court entered a memorandum order granting the pending motion to

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[1/]The bankruptcy court order which was the subject of Mr. Alber's district court appeal also ordered partial disgorgement of compensation by debtors' counsel, Appellee Morris Nichols Arsht & Tunnell ("MNAT") in connection with Mr. Alber's January 25, 2005 motion alleging conflicts of interest by MNAT, and approved a settlement between the post-effective date committee of unsecured creditors and Goldman Sachs & Co. The United States Trustee did not assert a position in the bankruptcy court or the district court appeal regarding those two matters and does not address them herein.

[2/]References in the form "Dist. D.I. ___" are to docket items in the district court.

dismiss, with prejudice. Dismissal Order, Dist. D.I. 55. Despite his lack of opposition to the motion to dismiss, Mr. Alber moved for reconsideration of the dismissal order on March 15, 2007. Alber Motion for Reconsideration, Dist. D.I. 57. While his motion for reconsideration was pending, Mr. Alber timely filed a notice of appeal to this Court on April 30, 2007. Notice of Appeal, Dist. D.I. 59. The district court entered a memorandum order denying reconsideration on June 12, 2007. Order Denying Reconsideration, Dist. D.I. 63.

STATEMENT OF THE FACTS

The Debtor filed its voluntary petition for relief under 11 U.S.C. § 1101 *et seq.* on March 7, 2001. Voluntary Petition, Bankr. D.I. 1.[3/] The official committee of unsecured creditors selected TBF as its counsel, and the bankruptcy court approved TBF's employment pursuant to 11 U.S.C. § 1103 on April 25, 2001. Order Approving Employment of TBF, Bankr. D.I. 246. Mr. Alber, an eToys shareholder, actively participated in the chapter 11 case and filed over two dozen pleadings therein. *See, e.g.*, Letter of Objection, Bankr. D.I. 1118; Motion for Discovery, Bankr. D.I. 1119; Objection to Plan Confirmation, Bankr. D.I. 1373. The bankruptcy court confirmed the Debtor's liquidating plan of reorganization on November 1, 2002, and the plan

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[3/]References in the form "Bankr. D.I. ___ are to docket items in the bankruptcy court.

became effective on November 2, 2002. Order Confirming Plan, Bankr. D.I. 1385; Notice of Effective Date, Bankr. D.I. 1406. By order dated February 27, 2003, the bankruptcy court approved final compensation of estate professionals, including TBF. Omnibus Final Compensation Order, Bankr. D.I. 1772.

On December 20, 2004, Mr. Alber filed an emergency motion seeking disqualification of TBF as counsel for the post-effective date committee of unsecured creditors ("PEDC"), removal of Mr. Gold as sole officer and director of the reorganized Debtor and plan administrator under the liquidating plan, and disgorgement of all compensation paid to TBF and Mr. Gold since the commencement of the bankruptcy case. Motion for Disgorgement and Removal, Bankr. D.I. 2145. Mr. Alber's motion alleged conflicts of interest arising from the joint ownership of a consulting firm, Asset Disposition Advisors ("ADA") by Mr. Gold and TBF partner Paul Traub. ADA was not involved in the eToys bankruptcy case; however, shortly after TBF's employment as counsel for the creditors' committee, the Debtor employed Mr. Gold individually as a wind-down coordinator and ultimately as its President. Although TBF disclosed its relationship with Mr. Gold and ADA in numerous other bankruptcy cases in Delaware and elsewhere, TBF did not amend its statement pursuant to FED.R.BANKR.P. 2014(a) in the eToys case to disclose its relationship with Mr. Gold. Mr. Alber alleged that TBF, its partners

and Mr. Gold had conflicts of interest which disabled them from serving in the eToys case. *Id.*.

On February 15, 2005, after conducting her own investigation, the United States Trustee moved for an order directing TBF to disgorge up to the full amount of fees paid to TBF as counsel to the eToys creditors' committee from the time the Debtor hired Mr. Gold until the effective date of the confirmed Chapter 11 plan, as a sanction for TBF's violation of its FED.R.BANKR.P. 2014(a) disclosure obligations. The United States Trustee's motion did not suggest a sanctions amount. The United States Trustee did not seek sanctions against Mr. Gold, whom eToys had hired as an employee under corporate governance principles rather than as a professional person under 11 U.S.C. § 327(a). United States Trustee's Motion for Disgorgement ,Bankr. D.I. 2195.

After the United States Trustee filed her motion against TBF, the United States Trustee and TBF agreed to settle the motion, subject to bankruptcy court approval, for disgorgement by TBF of $750,000 of compensation previously awarded. The United States Trustee moved for bankruptcy court approval of the proposed settlement on February 24, 2005. Motion to Approve Settlement, Bankr. D.I. 2201. Under the proposed settlement, the $750,000 would be returned to the Debtor's estate, which was being liquidated for the benefit of creditors. *Id.*, Ex. A.

The bankruptcy court conducted a day-long hearing on March 1, 2005, where Mr. Alber participated and cross-examined witnesses in connection with his and the United States Trustee's motions. After the hearing and review of post-hearing submissions, the bankruptcy court issued a written opinion and entered a final order on October 4, 2005, *inter alia*, approving the settlement between the United States Trustee and TBF and denying Mr. Alber's motion to the extent it sought relief against Mr. Gold or relief against TBF and its partners beyond that provided in the settlement between the United States Trustee and TBF.[4/] Bankruptcy Court Opinion, Bankr. D.I. 2319; Bankruptcy Court Order, Bankr. D.I. 2320.

Mr. Alber timely filed a notice of appeal from the bankruptcy court's order on October 14, 2005. Notice of Appeal to District Court, Bankr. D.I. 2327. Mr. Alber also timely filed a designation of the record on appeal pursuant to FED.R.BANKR.P. 8006. First Record Designation, Dist. D.I. 2. Mr. Alber's original designation included numerous items that were not a part of the record in the bankruptcy court. TBF, MNAT and Mr. Gold each moved to strike Mr. Alber's record designation in December 2005. Motions to Strike Record Designation, Dist. D.I. 8, 11, and 12,

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[4/]The bankruptcy court also granted in part Mr. Alber's separate motion to disqualify, and for disgorgement of fees by MNAT, and approved a settlement between the post-effective date committee and Goldman Sachs & Co. Bankruptcy Court Opinion at 55-56, Bankr. D.I. 2319; Bankruptcy Court Order, D.I. 2320.

respectively. The district court appeal did not proceed while the motion to strike Mr. Alber's designation of the record was pending. On August 30, 2006, the district court granted the motions to strike Mr. Alber's designation, finding that the items listed in the designation were not sufficiently identified to determine whether they were part of the record before the bankruptcy court. Order Striking Designation at 2, Dist. D.I. 22.

The district court entered a scheduling order on September 20, 2006, directing Mr. Alber to file his opening brief by September 27, 2006. Scheduling Order, Dist. D.I. 25. Mr. Alber immediately requested a one-week extension. First Extension Request, Dist. D.I. 27. By agreement of all parties, the district court entered a September 22, 2006 amended consolidated scheduling order which, *inter alia,* directed Mr. Alber to file his opening brief by October 4, 2006. Amended Consolidated Scheduling Order, Dist. D.I. 28.

Mr. Alber did not file his opening brief by the district court's October 4, 2006 deadline. On October 9, 2006, MNAT moved for a status conference to address Mr. Alber's failure to timely file an opening brief, and requested a stay of the deadlines by which the appellees were required to file their briefs. Motion for Status Conference, Dist. D.I. 29. The district court scheduled a telephonic status conference with the parties for October 16, 2006. On the morning of October 16, 2006, twelve

days after his opening brief was due, Mr. Alber responded to MNAT's motion for a status conference by filing a 22 page response with over 20 exhibits, requesting a second extension of time to file his opening brief. Request for Second Extension, Dist. D.I. 35. Mr. Alber's response justified his request for more time on the grounds he had been busy with the eToys case and with other litigation involving an individual named Johann Hamerski. *Id.* at 6-17. Mr. Alber asserted that he was unable to complete his opening brief due to the stress that had produced. *Id.* at 2-3; 17. Mr. Alber attached an October 6, 2006 letter from a nurse practitioner stating that Mr. Alber was "experiencing extreme stress and anxiety" and asking if "these legal matters could be put on hold for a time, allowing Mr. Alber time for a respite." *Id.*, Ex. A.

During the October 16, 2006 status conference, the district court expressed concern that Mr. Alber was able to generate a 22-page document with numerous attachments explaining why he needed an extension of time to file his opening brief, but claimed to be unable to generate an opening brief articulating his position on appeal. Transcript of October 16, 2006 Status Conference at 5, 9, Dist. D.I. 37. Nonetheless, the district court entered an order granting Mr. Alber an additional 30 days to file his opening brief. The district court instructed Mr. Alber that the court would entertain a motion for a further extension if he could not prepare his brief

within the 30 days because of his mental or emotional state, but would require Mr. Alber to submit to examination by an independent mental health practitioner to determine whether he was "genuinely unable to proceed." *Id.* at 10-12. The district court entered a second amended consolidated scheduling order on October 23, 2006, directing Mr. Alber to file his opening brief by November 15, 2006. Second Amended Consolidated Scheduling Order, Dist. D.I. 39.

Mr. Alber did not comply with the second amended consolidated scheduling order. He did not file his opening brief by November 15, 2006, nor did he move for an extension of time to file his brief as directed by the district court at the October 16, 2006 status conference. Mr. Alber instead sent a November 16, 2006 e-mail message to some of the appellees indicating his intent to move for an extension until November 27, 2006 to file his opening brief. Mr. Alber also indicated that his health was "greatly improved after the time off" and he was "in a mental state able to continue without break for the foreseeable future." Mr. Alber's e-mail suggested that his failure to comply with the November 15, 2006 deadline was not due solely to health concerns but was also due to the burden of other litigation, and potential criminal issues.

> [I]t's been a struggle since I've been served with 24 documents from the previously named 'associates' of some of you in the Arizona case, and, coincidentally, just a few days prior to my November 15th deadline they took

> steps to have me arrested. Those actions culminated with the local police visiting me, and my having to defend myself from yet more perjurious allegations, which necessitates my drafting a filing (albeit a short filing which will only take me a day or two at most) to deal with these new criminal allegations against me.

Motion to Dismiss, Ex. C, Dist. D.I. 42.

On November 17, 2006, TBF, MNAT, and Mr. Gold moved to dismiss Mr. Alber's appeal for failure to prosecute. Motion to Dismiss, Dist. D.I. 42. Mr. Alber did not oppose the motion, and still did not file his opening brief.

A magistrate judge of the district court entered an order on January 5, 2007 granting Mr. Alber a final opportunity to file his opening brief. Third Scheduling Order, Dist. D.I. 44. The order noted that Mr. Alber had not complied with the second amended consolidated scheduling order's November 15, 2006 filing deadline and that a motion to dismiss the appeal had been filed on November 17, 2006. The January 5, 2007 order stated that if Mr. Alber did not file his opening brief on or before January 18, 2007, the appeal would be dismissed for lack of prosecution. *Id.*. Mr. Alber did not comply with this deadline.

Mr. Alber's opening brief was not filed until January 23, 2007, five days after the deadline set forth in the January 5, 2007 "last chance" order. Alber District Court Brief, Dist. D.I. 49. He mailed copies of this brief to the parties on January 19, 2007 and sent copies by e-mail late in the day on January 22, 2007. TBF, MNAT and Mr.

Gold immediately contacted the district court by letter and requested that it act on the pending motion to dismiss the appeal or, alternatively, schedule a telephonic conference to establish remaining briefing deadlines. Request for Action on Motion to Dismiss, Dist. D.I. 48 . On February 5, 2007, TBF, MNAT and Mr. Gold filed their Emergency Motion to (A) Clarify the Absence of Briefing Deadlines; (B) Defer Appeal Briefing Pending Decision of Appellees' Motion to Dismiss, or in the Alternative, (C) Establish Briefing Schedule to Govern These Procedurally Consolidated Appeals. Motion to Clarify, Dist. D.I. 51. Mr. Alber did not oppose the motion.

On February 27, 2007, the district court entered a memorandum order granting the pending motion by TBF, MNAT and Gold to dismiss Mr. Alber's appeal, with prejudice. Dismissal Order, Dist. D.I. 55. The district court reviewed each of the six factors set forth in *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984) and found that (i) Mr. Alber was personally responsible for failure to pursue his appeal in a timely manner; (ii) his repeated failure to comply with court orders imposed additional burdens on the appellees and the district court and prevented timely resolution of the appeal; (iii) Mr. Alber had demonstrated a history of dilatory behavior; (iv) Mr. Alber's conduct was not consistent with an interest in or respect for the appellate process; (v) alternative sanctions short of dismissal would not be

effective; and (vi) in challenging the bankruptcy court's decisions on matters in which the bankruptcy court had broad discretion, Mr. Alber had only minimal probability of success. Dismissal Order at 4-6, Dist. D.I. 55. The district court therefore determined that "the factors identified in *Poulis* weigh in favor of dismissal with prejudice." *Id.* at 6.

Non-party Steven Haas moved for reconsideration on March 12, 2007. Haas Motion for Reconsideration, Dist. D.I. 56. Mr. Alber moved for reconsideration on March 15, 2007. Alber Motion for Reconsideration, Dist. D.I. 57. The district court denied both motions on June 12, 2007, noting that the motions did not demonstrate grounds to warrant reconsideration. Order Denying Reconsideration, Dist. D.I. 63. Mr. Alber timely filed a notice of appeal of the district court's February 27, 2007 dismissal order on April 30, 2007, while the motions for reconsideration were pending. Notice of Appeal, Dist. D.I. 59.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The bankruptcy court order from which Mr. Alber appealed to the district court was also appealed by Steven Haas, in his capacity as President of administrative claimant Collateral Logistics, Inc. ("CLI"). By order dated August 30, 2006, the district court dismissed Mr. Haas's appeal for lack of standing (because the

bankruptcy court's order affected CLI's interests, not those of Mr. Haas) and for CLI's failure to retain counsel.

Mr. Haas timely appealed the district court's dismissal order to this Court on October 2, 2006, under Case No. 06-4308. On March 23, 2007, this Court dismissed the appeal as to CLI for failure to prosecute because CLI had not retained counsel. On May 16, 2007, this Court entered an order summarily affirming the district court's order of dismissal as to Mr. Haas, agreeing with the district court's analysis and decision that Mr. Haas lacked standing to appeal.

STANDARD OF REVIEW

This Court reviews dismissal orders, whether imposed as a sanction for violation of court orders or for failure to prosecute, under an abuse of discretion standard, recognizing that such relief should be entered sparingly. *See Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992) (dismissal for failure to comply with orders; "[T]he scope of *our* review is restricted to determining whether the district court abused *its* discretion. How we imagine we might have exercised our own discretion had we been in the district court judge's robe is entirely irrelevant.")(emphasis in original); *Poulis v. State Farm Fire & Cas. Co.*,747 F.2d 863, 868 (3d Cir. 1984)(dismissal for failure to comply with court-ordered deadlines); *Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund*, 29

F.3d 863, 870 (3d Cir. 1994) (failure to prosecute; question is not whether the reviewing court would as an original matter have dismissed; it is whether district court abused its discretion in so doing.); *Jewelcor v. Asia Commercial Co., Ltd. (In re Jewelcor, Inc.)*, 11 F.3d 394, 397 (3d Cir. 1993) (standard for reviewing dismissal of appeal for failure to prosecute is abuse of discretion, but district court must have considered less severe sanctions).

SUMMARY OF ARGUMENT

The district court's dismissal of Mr. Alber's appeal for lack of prosecution did not constitute an abuse of discretion. The district court appropriately considered each of the *Poulis* factors, as this Court requires. Based on that review, it determined dismissal was the only effective means of addressing Mr. Alber's continued failure to meet mandatory filing deadlines.

This was not an abuse of discretion. Mr. Alber violated no less than three district court-imposed deadlines to file an opening brief. The district court generously gave him additional chances to file his brief. Only when Mr. Alber repeatedly failed to do so did the court dismiss for failure to prosecute. That was not an abuse of discretion.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING MR. ALBER'S APPEAL GIVEN MR. ALBER'S FAILURE TO PROSECUTE IT.

The district court dismissed Mr. Alber's appeal for failure to prosecute because he failed to comply with three separate orders requiring him to file his opening appeal brief by the dates specified in those orders. It is universally understood that courts may dismiss cases for defiance of rules and of court orders. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991) ("The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (citations omitted)); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 360 (1988) ("Courts have historically possessed an inherent power to dismiss suits for discretionary reasons such as failure to prosecute" (*citing Link v. Wabash R. Co.*, 370 U.S. 626, 629-31 (1962)); *Degen v. United States*, 517 U.S. 820, 827 (1996) ("A federal court has at its disposal an array of means to enforce its orders, including dismissal in an appropriate case."); *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003) ("When noncompliance occurs, the ordering court should consider the totality of

events and then choose from the broad universe of available sanctions in an effort to fit the punishment to the severity and circumstances of the violation.")

The law in the Third Circuit is no different. A district court may dismiss a case for failure to abide by court orders or failure to prosecute. *See, e.g., Mindek, supra*, 964 F.2d at 1373; *Poulis, supra*, 747 F.2d at 868; *New Jersey Brewery Employees' Pension Trust Fund, supra*, 29 F.3d at 870; *Jewelcor, supra*, 11 F.3d at 397 However, before determining that dismissal is an appropriate sanction for disobedience of its orders, the district court is required to balance the six factors enumerated in *Poulis, supra*: "(1) the extent of the *party's* personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense." 747 F.2d at 868 (emphasis in original).

Although the district court must consider each of the *Poulis* factors, it is not necessary that all of those factors weigh against the noncompliant party to find that dismissal is warranted. *Hicks v. Feeney*, 850 F.2d 152, 156 (3d Cir. 1988), *cert. denied*, 488 U.S. 1005, 109 S.Ct. 786 (1989). The standard of review from such a dismissal is deferential, and the scope is narrow. This Court has held that its role is

limited to determining whether the district court properly balanced the *Poulis* factors and whether the record supports its findings. *Livera v. First Nat. State Bank of New Jersey*, 879 F.2d 1186, 1194 (3d Cir. 1989), *citing Hicks, supra*. Importantly, it is not relevant that this Court might have ruled differently upon its own consideration of the *Poulis* factors. As this Court has stated, "the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court-a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted." *Mindek, supra*, 964 F.2d at 1373.

The district court properly balanced the *Poulis* factors, and the record amply supports the court's findings in that regard.

A. The District Court Did Not Abuse its Discretion in Finding Mr. Alber Was Personally Responsible.

With respect to personal responsibility for failure to comply with rules or court orders, this Court has expressed a preference for "visiting sanctions directly on the delinquent lawyer rather than on a client who is not actually at fault." *Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund, supra*, 29 F.3d at 873. In this case, Mr. Alber bears full responsibility for his failure to timely file his opening brief. He is not the sympathetic "innocent client" of a delinquent

attorney; he has instead acted *pro se* from the inception of the eToys, Inc. bankruptcy case and, as the district court noted in its memorandum order dismissing the appeal, "has been an effective advocate in the bankruptcy proceedings." Dismissal Order at 4, Dist. D.I. 55.

Mr. Alber's *pro se* status means only that he has no attorney to whom he can point as the cause of the delay; he bears the responsibility himself. *Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund, supra*, 29 F.3d at 873. Moreover, Mr. Alber is not entitled to any special dispensation as a *pro se* litigant. Court rules and orders apply with equal force to *pro se* parties as to other litigants. *See Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

Mr. Alber's alleged health issues do not excuse his failure to comply with the district court's orders. During the October 16, 2006 telephonic status conference, the district court instructed Mr. Alber that it would entertain a motion for a further extension of the briefing deadline if he could not prepare his brief within 30 days because of his health, with the caveat that he would be required to submit to an independent examination. Transcript of October 16, 2006 Status Conference at 11, 13, Dist. D.I. 37. Mr. Alber had ample opportunity to move for a further extension of the briefing deadlines, but did not avail himself of such opportunity and did not submit himself for independent examination. He also had ample opportunity to alert

the district court to his allegedly continuing health issues by, *inter alia*, answering the motion to dismiss filed by TBF, MNAt and Mr. Gold on November 17, 2006.

The district court did not abuse its discretion in determining that Mr. Alber was personally responsible for his failure to timely file an opening brief.

B. The District Court Did Not Abuse its Discretion in Finding The Appellees Have Been Prejudiced.

The district court noted in its memorandum order dismissing Mr. Alber's appeal, that Mr. Alber's repeated failure to comply with the court's orders, and the motion practice caused by such failure, have imposed additional burdens on the appellees and on the court itself. The district court further noted that given the nature of Mr. Alber's complaints against the appellees, timely resolution of the appeal was thwarted by Mr. Alber's conduct. Dismissal Order at 4, Dist. D.I. 55. This was not an abuse of discretion.

Prejudice includes the burden a party must bear when forced to file motions in response to an adversary's delay tactics. *See Ware v. Rodale Press, Inc.*, 322 F.3d 218, 223-24 (3d Cir. 2003). Mr. Alber's repeated failure to timely file his opening brief was in and of itself prejudicial to the appellees, who were forced to file motions in response to Mr. Alber's delay tactics.

Here, several of the appellees had to file no fewer than three motions responding to Mr. Alber's failure to file a timely brief. The district court held a status conference which counsel for TBF, MNAT, Mr. Gold and the United States Trustee attended. None of this would have been necessary had Mr. Alber timely prosecuted his appeal.

C. The District Court Did Not Abuse its Discretion in Finding Mr. Alber Has Demonstrated a History of Dilatoriness.

The district court found that Mr. Alber had demonstrated a history of dilatory behavior in the case, starting with his improper designation of the record on appeal and ending with the untimely filing of his opening brief. Dismissal Order at 4-5, Dist. D.I. 55. The court did not abuse its discretion in making this finding. *See Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 874 (3d Cir. 1994) (Excessive or repeated delay or delinquency constitutes a history of dilatoriness, such as consistent tardiness in complying with court orders.); *Jewelcor, supra,* 11 F.3d at 874 (same, *citing Poulis, supra*, 747 F.2d at 868).

Mr. Alber initially delayed the proceedings in the district court appeal by submitting a patently inadequate and inappropriate designation of the record on appeal pursuant to FED.R.BANKR.P. 8006. First Record Designation, Dist. D.I. 2. Mr. Alber's original designation included many items that were not a part of the

record in the bankruptcy court. TBF, MNAT and Mr. Gold each moved to strike Mr. Alber's record designation in December 2005. Dist. D.I. 8, 11, 12. The district court appeal did not progress while the motion to strike Mr. Alber's designation was pending. On August 30, 2006, the district court granted the motions to strike Mr. Alber's designation, finding that the items listed in the designation were not sufficiently identified to determine whether they were part of the record before the bankruptcy court. Order Striking Designation at 2, Dist. D.I. 22. Mr. Alber's improper and inadequate record designation delayed the progress of the district court appeal for approximately eight months.

Mr. Alber also demonstrated a history of dilatory behavior by his serial defiance of scheduling orders. Even after the district directed Mr. Alber to move for an additional extension of time if his health so required (and advised him that he would need to undergo an independent mental health examination to support such a motion), Mr. Alber repeatedly elected to allow briefing deadlines to expire without moving for extensions. When Mr. Alber's health permitted him to prepare his opening brief, he elected to delay preparing such a brief while he pursued other legal proceedings. Motion to Dismiss, Ex. C, Dist. D.I. 42. The district court's finding that Mr. Alber demonstrated a history of dilatoriness is well-supported by the record and, at a minimum, does not constitute an abuse of discretion.

D. The District Court Did Not Abuse its Discretion in Ruling Mr. Alber's Conduct Was Willful.

The district court determined that Mr. Alber's conduct in the appeal had not been consistent with an interest in, or respect for, the appellate process. Dismissal Order at 5, Dist. D.I. 55. Willfulness can involve intentional or self-serving behavior. *New Jersey Brewery Employees' Pension Trust Fund, supra*, 29 F.3d at 875. In some instances a history of dilatoriness also suffices to demonstrate willfulness and/or bad faith. *See Ware v. Rodale Press, Inc., supra*, 322 F.3d at 224 (3d Cir. 2003).

Here, Mr. Alber demonstrated willful disrespect for the appellate process and the district court itself by repeatedly disobeying scheduling orders. Mr. Alber also acted willfully when he elected to delay preparing his opening brief while he pursued his other legal proceedings in Arizona. In doing so, he chose to serve his interests in the Arizona litigation at the expense of complying with deadlines in the eToys appeal.

E. The District Court Did Not Abuse Its Discretion in Finding Sanctions Other Than Dismissal Would Not Be Effective.

The district court found that no sanction short of dismissal would be effective "given the threat of sanctions communicated at the October 16, 2006 status conference and through the January 5, 2007 order." Dismissal Order at 5, Dist. D.I. 55.

Mr. Alber asserts that the district court did not threaten him with sanctions on October 16, 2006, but instead granted his request for an extension of time to file his opening brief and told him more time would be granted if necessary. *See* Appeal Brief at 9. Mr. Alber is correct that the district court did not threaten him with "sanctions." The district court advised Mr. Alber at the October 16, 2006 status conference that the price of any further delay (beyond November 15, 2006) in filing his opening brief would be submission to an independent mental health examination, for which he might be required to bear some or all of the cost. Transcript of October 16, 2006 Status Conference at 10-12, Dist. D.I. 37. In considering the effectiveness of sanctions other than dismissal, the district court may have viewed this "price of delay" as a sanction. If this was error, it was harmless.

Mr. Alber appears to have been undaunted by the prospect of submitting to an independent mental health examination, because he apparently had no intention of so submitting. Instead of moving for an extension of time beyond November 15, 2006 and paying the "price" described by the district court, Mr. Alber simply took additional time without authorization by disobeying the second amended scheduling order, unconcerned about how the appellees and the court would respond.

Mr. Alber also suggests that the magistrate judge who entered the "last chance" order of January 5, 2007 acted without "standing." *See* Mr. Alber's Appeal Brief at

9. Mr. Alber appears to suggest, albeit implicitly, that he could ignore that order with impunity because the magistrate judge had no means to enforce the threat of severe sanctions. The implied corollary of this suggestion is that the risk of sanctions less severe but more certain to be imposed by a district judge would somehow have induced Mr. Alber to comply with the district court's orders. However, by the time the "last chance" order was entered, Mr. Alber had already disobeyed two scheduling orders entered by district court judges, and a motion to dismiss his appeal had been pending for seven weeks. Mr. Alber's failure to move for a further extension of the November 15, 2006 briefing deadline, to oppose the motion to dismiss his appeal, to file his opening brief promptly after the motion to dismiss was filed, or even to challenge the magistrate judge's scheduling order, already demonstrated that Mr. Alber was unconcerned about dismissal, let alone lesser sanctions, that might be imposed.

Finally, the order dismissing Mr. Alber's appeal was not entered by the magistrate judge; it was entered by a judge of the district court. The issue of the magistrate judge's authority to act is not before this Court. Moreover, even if the magistrate judge lacked authority to enter a dismissal order, nothing precluded her from entering case management orders such as the January 5, 2007 scheduling order. In fact, the magistrate judge's January 5, 2007 order actually extended the time for

Mr. Alber to file his delinquent brief. If that order was a nullity, then Mr. Alber filed his brief 69 days late rather than five days after the "last chance" deadline.

Mr. Alber's conduct demonstrated that he was unconcerned about sanctions. Accordingly, no sanction short of dismissal of the appeal would have been effective, and the district court did not abuse its discretion in so finding.

E. The District Court Did Not Abuse Its Discretion in Finding Mr. Alber's Appeal Lacks Merit.

In considering the final *Poulis* factor, whether the case or appeal is meritorious, the district court reviewed the bankruptcy court's opinion and the order from which Mr. Alber appealed. Although the district court considered Mr. Alber's likelihood of success on appeal when conducting its *Poulis* analysis, the court did not necessarily analyze the merits to the same degree it would have had the court been considering a fully briefed appeal on the merits rather than a motion to dismiss for failure to prosecute. This was an appropriate exercise of the district court's discretion, supported by the record.

How this Court might have exercised its own discretion in considering the merits of Mr. Alber's appeal and its likelihood of success is not the relevant test; the scope of this Court's review is restricted to determining whether the district court abused its discretion in determining that Mr. Alber's likelihood of success on appeal

was minimal. *See Mindek v. Rigatti, supra*, 964 F.2d at 1373. If this Court affirms the district court's dismissal order, it need not address the underlying merits of Mr. Alber's appeal. If this Court reverses the dismissal order, it should remand the case to the district court for a decision on the merits. The United States Trustee briefly discusses the merits herein only for the purpose of demonstrating that the district court properly considered the final *Poulis* factor.

The district court correctly observed that Mr. Alber was challenging the bankruptcy court's exercise of discretion in matters over which bankruptcy courts possess broad discretion. Dismissal Order at 5-6, Dist. D.I. 55. The court further observed that in matters where the bankruptcy court has broad discretion, the likelihood of a successful challenge to the exercise of that discretion is minimal. *Id.* It is well-settled that bankruptcy courts have broad discretion to fashion an appropriate remedy when confronted with an estate professional's violation of the Bankruptcy Code's disinterestedness requirements or a breach of the professional's disclosure obligations under FED.R.BANKR.P. 2014(a). *See United States Trustee v. Price Waterhouse*, 19 F.3d 138 (3d Cir. 1994) (construing section 328(c) of the Bankruptcy Code to give the bankruptcy court discretion over the disallowance of fees when an estate professional is not a disinterested person at any time during his employment). A court's power to order disgorgement of a professional's fees and

expenses is not to be applied woodenly. It should instead be "exercised with restraint and discretion;" in exercising that discretion, the court "should apply principles of equity, as other courts have done." *Matter of Olsen Indus., Inc.*, 222 B.R. 49, 62 (Bankr. Del. 1997), *citing In re Downs*, 103 F.3d 472, 478 (6th Cir. 1996). The nature of the sanction "should be determined with a view to its deterrent value, not necessarily limited to the harm caused litigants." *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30, 42 n.7 (1st Cir. 1999).

It is similarly well-settled that stipulations in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the estate, and providing for the efficient resolution of bankruptcy cases. *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996); *In re Coram Healthcare Corp.*, 315 B.R. 321, 329 (Bankr. D. Del. 2004). A bankruptcy court should approve a stipulation if its is fair and equitable and is in the best interest of the estate. *In re Cajun Electric Power Cooperative, Inc.*, 119 F.3d 349, 355 (5th Cir. 1997). To make this determination, the bankruptcy court "must assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Id.* at 356; *Martin, supra*, 91 F.3d at 393. Under *Martin*, the bankruptcy court is required to consider four discrete criteria: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved and the

expense, inconvenience and attendant delay; and (4) the paramount interest of the creditors. *Martin, supra*, 91 F.3d at 393.

In this case, with respect to the settlement of the United States Trustee's motion for sanctions against TBF, the bankruptcy court specifically addressed all four of the *Martin* factors. Most important was the bankruptcy court's finding regarding probability of success in litigation, as the court found that while there was a strong probability that the United States Trustee would succeed *in part* on its sanctions motion (because of TBF's admitted FED.R.BANKR.P. 2014(a) disclosure violation), there was a risk of not succeeding on the issue of actual conflict of interest if that issue were litigated. The bankruptcy court also found that the paramount interest of creditors was served by the settlement, as TBF's $750,000 disgorgement was a substantial penalty, and that the settlement furthered the deterrent goal of a sanctions motion. Bankruptcy Court Opinion at 41-42, Bank. D.I. 2319.

The bankruptcy court also specifically addressed its decision not to impose sanctions on Mr. Gold (whose status as an employee of the Debtor was not an issue), as it held that executive employees of a debtor are not professionals who must be employed under section 327(a) of the Bankruptcy Code. Bankruptcy Court Opinion at 50, Bank. D.I. 2319.

The bankruptcy court's order underlying Mr. Alber's district court appeal, as well as the accompanying opinion, reflect thorough consideration of the evidence presented, painstaking legal analysis, and careful application of the law to the facts. In sum, they demonstrate the bankruptcy court's sound exercise of judicial discretion. Accordingly, the district court did not abuse its discretion in determining that Mr. Alber's likelihood of a successful challenge to the exercise of the bankruptcy court's discretion was minimal.

CONCLUSION

For these reasons, the United States Trustee respectfully asks this Court to affirm the district court order dismissing Mr. Alber's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect version 12 in 14 point Times New Roman.

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CERTIFICATION OF BAR MEMBERSHIP (L.A.R. 46.1)

Pursuant to Third Circuit Local Appellate Rule 46.1, I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATION PURSUANT TO L.A.R. 31.1(c)

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify as follows:

1. The text of the electronic version of this brief is identical to the text in the paper copies of this brief.

2. A virus check was performed on the PDF file of the foregoing Brief for Appellee The United States Trustee prior to filing, using Computer Associates eTrust Antivirus version 7.1.501.

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CERTIFICATE OF SERVICE

I, Mark S. Kenney, Esquire, hereby certify that on September 21, 2007, a true and correct copy of the foregoing Brief for Appellee The United States Trustee was electronically filed with the Court and two (2) copies were served upon the following parties by first class mail, postage pre-paid.

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