No. 10-35206

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: ROMAN CATHOLIC ARCHBISHOP OF PORTLAND IN OREGON, and Successors, a Corporation Sole, dba Archdiocese of Portland in Oregon,

FATHER M and FATHER D,
Appellants,

v.

VARIOUS TORT CLAIMANTS,
Appellees.

Appeal from the United States District Court for the District of Oregon
District Court Case No. 09-CV-01396-AA

APPELLEES' PETITION FOR REHEARING EN BANC

For Appellees Various Tort Claimants:

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INTRODUCTION

Consideration of this case by the full Court is necessary because the proceeding involves three questions of exceptional importance.

First, there are widespread implications for the panel's determination that 11 U.S.C. §107(b) requires that a bankruptcy court seal material filed in the court record on the request of a person who is "disgrace[d], offen[ded], or shame[d]" by the material.

Second, the panel's opinion indicates that it did not review Hon. Elizabeth L. Perris's decision to modify the protective order for abuse of discretion, but rather, conducted a *de novo* review of the record.

Third, the panel's opinion that material must be sealed pursuant to 11 U.S.C. § 107(b) at the request of an interested party if the material is "disgraceful, offensive, shameful and the like" conflicts with the First Circuit's decision in *In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005), and the Eighth Circuit's decision in *In re Neal*, 461 F.3d 1048 (8th Cir. 2006). There is an overriding need for a common standard for sealing materials in bankruptcy court files.

ARGUMENT

I. The Panel's Construction of 11 U.S.C. §107(b) Means That Significant Portions of Bankruptcy Court Files Will Be Sealed from Public View.

As *amici* wrote in their brief, "[t]he doors to courtrooms would slam shut if every allegation that might embarrass someone is concealed from public view."[1] Yet as the panel defined "scandalous" for purposes of 11 U.S.C. §107, that is exactly what will happen, because according to the panel, "scandalous" means "disgraceful, offensive, shameful and the like," and a bankruptcy court must seal material at a person's request if the material disgraces, offends, or shames the person. Slip Op. at 17928-17929. In other words, as interpreted by the panel, 11 U.S.C. §107 requires that material that is embarrassing to a person must be sealed at that person's request.

Many people are ashamed to file a bankruptcy petition, ashamed to list their creditors, and ashamed to make public the information in their Statement of Financial Affairs. However, that information is of often of significant public interest. The panel's rule would require bankruptcy courts to seal those documents,

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[1] *Amicus Curiae Brief of Survivors Network of Those Abuse by Priests, national Center for Victims of Crime, Allied Daily Newspapers of Washington, Oregon Newspaper Publishers Association, and Washington Newspaper Publishers Association*, p. 1 (Docket #16-1). For reasons not clear, the motion of amici curiae for leave to file a brief (Docket #16-2) was not acted on by the Court, although it squarely addressed the test for applying 11 U.S.C. §107(b).

along with any and all other documents a debtor, creditor, or anyone else finds disgraceful, offensive, or shameful. That cannot be what Congress intended when it supplanted the common law right of access to bankruptcy court files with 11 U.S.C. §107.

II. The Panel Substituted Its Own Findings and Conclusions for the Bankruptcy Court's Rather Than Reviewing for Clear Error and Abuse of Discretion.

Hon. Elizabeth L. Perris reviewed every page of the hundreds of documents that were the subject of the motions below, including those at issue on appeal, and issued a lengthy and detailed opinion. Judge Perris had presided over the Archdiocese of Portland's complex bankruptcy case and the litigation over the discovery and release of documents that took place both during and after the resolution of the bankruptcy case,[2] and no one was in a better position to appreciate the context of the documents, and to weigh the evidence below, than Judge Perris. Nonetheless, the panel substituted its own conclusions about the evidence:

> "[G]iven the priests' declarations regarding the harm they would experience should their names be associated with the Archdiocese bankruptcy and settlement, including public humiliation, loss of career (in the case of Father M), and possible eviction from a retirement home (in the

[2] There were several errors in the panel's summary of the procedural history of the case. However, none was material to the opinion, and appellees acknowledge the complexity of that history.

> case of Father D), a finding that these priests did not show particularized harm would have been 'illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'"

Slip Op. at 17919 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). The panel thus credited as entirely true the declarations of Father D and Father M without reference to other information in the record that cast doubt on their veracity, and without acknowledging that the bankruptcy court could have discredited the declarations.

Judge Perris was entitled to give the priests' declarations the weight she believed they were entitled to, and to evaluate the credibility of the statements in them along with any reasonable inferences from them when considered in conjunction with the evidence before her. That evidence includes the documents that are the subject of this appeal, which appellants chose not to make part of the record before this Court despite the fact that it is appellants' burden to show that the documents should be protected.

In reaching its conclusion, the bankruptcy court cited to the same balancing factors as did this Court's panel, i.e. those factors set forth in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3rd Cir. 1995). The bankruptcy court concluded that the desires of Father M and Father D to be protected from scandal did not demonstrate a clearly defined and serious injury outweighing the public interest in

disclosure. The panel, however, did not agree with respect to the materials concerning Father D, concluding that because Father D was retired and that "nothing in the record indicates that he continues working in the community," Father D was not a threat to public safety. Slip Op. at 17921. Thus, based on its own factual conclusion on the question of whether Father D was too old to be a threat to children, the panel found that the bankruptcy court had abused its discretion in declining to redact Father D's name from the personnel files. Slip Op. at 17922. That is not how the "abuse of discretion" standard is supposed to work.

This Court is supposed to review factual conclusions of the bankruptcy court for clear error and to determine whether the bankruptcy court abused its discretion in applying the law to the facts, not re-weigh the evidence and substitute its own judgment for that of the bankruptcy court, but that is not what the panel did.

III. The Panel's Opinion Conflicts with Two Other Circuits on a Subject of Exceptional Importance.

The question of what materials may be filed under seal in a bankruptcy court is a question of exceptional significance. The panel's opinion states that material must be sealed pursuant to 11 U.S.C. §107(b) at the request of an interested party if the material is "disgraceful, offensive, shameful and the like." Slip Op. at 17928-17929. That conclusion conflicts with decisions of the First and Eighth Circuits.

In *In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005), the First Circuit concluded that material is subject to the protection of 11 U.S.C. §107(b) only if it would "cause a reasonable person to alter his opinion of an interested party" *and* "either (1) the material is untrue, or (2) the material is potentially untrue and irrelevant or included within a bankruptcy filing for an improper end." *Id*. at 14.

In *In re Neal*, 461 F.3d 1048 (8th Cir. 2006), the Eighth Circuit concluded that material is "scandalous" for purposes of 11 U.S.C. §107(b) if it could cause a reasonable person to alter their opinion based on the content of the material in the context in which it appears. *Id.* at 1054 (citing *In re Phar-Mor, Inc.*, 191 B.R. 675, 679 (Bankr.N.D.Ohio 1995)).

Thus, there are now three separate standards for sealing documents filed in a bankruptcy proceeding in the only three circuits that have interpreted 11 U.S.C. §107(b), but the panel's standard contains none of the elements of either of the other two circuits which have addressed this issue. Because of the importance of the issue of public access to bankruptcy court files, the Court should determine en banc if the panel's standard should remain the law of this circuit.

CONCLUSION

For the reasons herein, the Court should rehear this case en banc.

DATED this 5th day of October, 2011.

LAW OFFICE OF ERIN OLSON, P.C.

s/ Erin K. Olson
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VII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,406 words.

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 it has been prepared in Word 2003 using Times New Roman in 14 pt type.

DATED this 5th day of October, 2011.

LAW OFFICE OF ERIN OLSON, P.C.

s/ Erin K. Olson
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing **APPELLEES' PETITION FOR REHEARING EN BANC**, on October 5, 2011, by ECF Filing.

I further certify that I served a true and correct copy of the foregoing **APPELLEES' PETITION FOR REHEARING EN BANC** upon the following counsel for interested parties and persons by ECF Filing and by depositing true copies thereof into the United States mail at Portland, Oregon on the date set forth below:

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DATED this 5th day of October, 2011.

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