

**July 12, 2010**

**Barbara A. Schermerhorn**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE HEALTH TRIO, INC.,  
Debtor.

BAP No. CO-09-073

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HEALTH TRIO, INC.,  
Appellant,

Bankr. No. 09-34404  
Chapter 7

v.

OPINION\*

CENTENNIAL RIVER CORP.,  
formerly known as Immedient Corp.,  
AXIOM SYSTEMS, INC., and  
JOHNSON-LAIRD, INC.,  
Appellees.

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Appeal from the United States Bankruptcy Court  
for the District of Colorado

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Before MICHAEL, NUGENT, and THURMAN, Bankruptcy Judges.

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NUGENT, Bankruptcy Judge.

Appellant Heath Trio, Inc. (“Health Trio”) appeals from an order for relief adjudicating Health Trio a debtor that was entered by the United States Bankruptcy Court for the District of Delaware after it transferred the case to the United States Bankruptcy Court for the District of Colorado. Health Trio asserts

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\* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

that the Delaware court lacked jurisdiction to issue the order.<sup>1</sup>

## **I. Factual Background**

On February 18, 2009, Appellees Centennial River Corp. f/k/a Immedient Corp., Axiom Systems, Inc., and Johnson-Laird Inc. (“Petitioning Creditors”) filed a Chapter 7 involuntary petition against Health Trio in the United States Bankruptcy Court for the District of Delaware (“the Delaware Bankruptcy Court”). In response, Health Trio filed motions to dismiss and to transfer venue to the United States Bankruptcy Court for the District of Colorado (“the Colorado Bankruptcy Court”).<sup>2</sup> On May 4, 2009, the Delaware Bankruptcy Court denied the motion to dismiss.<sup>3</sup>

On November 12, 2009, after a hearing, the Delaware Bankruptcy Court granted the motion to transfer venue.<sup>4</sup> In the Order Transferring Venue, the Delaware Bankruptcy Court incorrectly stated that an order for relief had been entered in this involuntary case, citing Docket No. 19. As of November 12, however, no order for relief had been entered. Rather, Docket No. 19 was the Order Denying [Health Trio’s] Motion to Dismiss.

On November 16, 2009, the Delaware Bankruptcy Court sent a letter to the Colorado Bankruptcy Court enclosing a copy of the Order Transferring Venue and the Colorado Bankruptcy Court docketed the order on November 19, 2009.<sup>5</sup>

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<sup>1</sup> The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

<sup>2</sup> See Health Trio’s *Motions to Transfer Venue and to Dismiss; Answer and Counterclaims to the Involuntary Petition*, in Amended Appendix (“App.”) at 41-45.

<sup>3</sup> *Order Denying Motion to Dismiss*, in App. at 82.

<sup>4</sup> *Order Transferring Venue*, in App. at 162-63.

<sup>5</sup> See Colorado Bankruptcy Court Case No. 09-34404-HRT, Dkt. No. 16, in  
(continued...)

On November 23, 2009, after the transfer, Petitioning Creditors filed a motion to clarify and requested the Delaware Bankruptcy Court enter an order for relief. On December 10, 2009, the Delaware Bankruptcy Court granted the motion to clarify and entered the Order for Relief that is the subject of this appeal.

## **II. Discussion**

In this appeal, Health Trio asks this Court to vacate an order of the Delaware Bankruptcy Court that was entered by that court after it had transferred jurisdiction over the case to the Colorado Bankruptcy Court. Health Trio argues that the Delaware Bankruptcy Court did not have jurisdiction to enter the order for relief after transfer of the case to the Colorado Bankruptcy Court. The Petitioning Creditors now concede that the Order of Relief should be vacated.<sup>6</sup>

On December 23, 2009, Health Trio timely filed two separate notices of appeal from the Delaware Bankruptcy Court's order; one in the Delaware Bankruptcy Court to the Delaware District Court, and another in the Colorado Bankruptcy Court to the Colorado District Court.<sup>7</sup> On December 29, 2009, Health Trio filed an election to have this appeal heard by the Colorado District Court

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<sup>5</sup> (...continued)  
App. at 13.

<sup>6</sup> On May 20, 2010, Health Trio and the Petitioning Creditors filed a Joint Motion to Expedite Disposition of Appeal and Confession of Relief Requested in this Court (the "Motion"), in which the parties agreed that this Court should enter an order "directing that the [Delaware Bankruptcy Court's December 10, 2009] Order for Relief be vacated[.]" *Motion* at 2.

On May 24, 2010, the Court granted the portion of the Motion seeking to expedite this appeal, and referred to the panel on the merits for consideration the portion of the Motion that sought vacation of the December 10, 2009, Order for Relief and remand of this matter to the Colorado Bankruptcy Court. In accordance with this Opinion, that latter outstanding portion of the Motion is **HEREBY DENIED**.

<sup>7</sup> *Notice of Appeal [to the United States District Court for the District of Delaware]*, in App. at 178-82; *Notice of Appeal [to the United States District Court for the District of Colorado]*, in App. at 183-86.

pursuant to 28 U.S.C. § 158(c)(1).<sup>8</sup> Because Health Trio did not file its election with the notice of appeal, this Court issued an order denying the election pursuant to 28 U.S.C. § 158(c)(1) and Federal Rule of Bankruptcy Procedure 8001(e).<sup>9</sup>

Health Trio moved for a stay pending this appeal in both the Colorado Bankruptcy Court and the Delaware Bankruptcy Court.<sup>10</sup> The Colorado Bankruptcy Court granted a stay pending appeal on February 25, 2010.<sup>11</sup>

The Colorado Bankruptcy Court's order granting stay contains an excellent summary and analysis of the Delaware Bankruptcy Court's jurisdiction to issue an order after a motion for transfer of venue has been granted. As noted by that Court, it appears to be well-settled that once an order transferring venue is entered, and the papers lodged with the clerk of the transferee court, the transferor court loses all jurisdiction over the case and may not proceed further with regard to it.<sup>12</sup> In this case, the Delaware Bankruptcy Court entered the transfer order on November 12, 2009. The Colorado Bankruptcy Court docketed

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<sup>8</sup> Health Trio's *Election*, Dkt. No. 64673.

<sup>9</sup> See *Order Denying Election*, Dkt. No. 64675. Section 158(c)(1) of Title 28, United States Code, provides in relevant part that "each appeal . . . shall be heard by a 3-judge panel of the bankruptcy appellate panel service . . . unless - (A) the appellant elects at the time of filing the appeal." Appellees did not file an election to have this appeal heard by the district court. On February 25, 2010, Health Trio filed a motion in the Delaware District Court requesting that it transfer venue over its appeal to the District of Colorado. On June 11, 2010, the Delaware District Court granted that motion, and on June 25, 2010, that appeal was transferred to the Colorado District Court.

<sup>10</sup> See *Motion for Stay Pending Appeal [before Colorado Bankruptcy Court]*, in App. at 187-92; Delaware Bankruptcy Court Case No. 09-10555, Dkt. No. 53, in App. at 34.

<sup>11</sup> See *Order Granting Motion for Stay Pending Appeal*, in App. at 193-98. The Delaware Bankruptcy Court has not yet ruled on the motion for stay pending appeal that was before it, and probably won't, since the Delaware District Court transferred the appeal to the Colorado District Court on June 25, 2010.

<sup>12</sup> 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3846 (2d ed. 1986); *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982); *In re Sw. Mobile Homes, Inc.*, 317 F.2d 65 (5th Cir. 1963).

the case on November 16, 2009. The act of docketing the case divested the Delaware Bankruptcy Court of jurisdiction over the case. The Order for Relief sought to be appealed was entered on December 10, 2009, and therefore appears to be void.

As the parties do, both the Colorado Bankruptcy Court and this Court agree that the Delaware Bankruptcy Court acted outside of its jurisdiction in issuing the Order for Relief. However, this Court may not review the orders of the Delaware Bankruptcy Court, and therefore cannot vacate its orders. The jurisdiction of the bankruptcy appellate panels is established in 28 U.S.C. § 158(a)(3), which provides that appeals from bankruptcy court decisions “shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.” Here, the Delaware Bankruptcy Court entered the appealed order. By statute, this Court cannot review appeals from the District of Delaware. Therefore, we dismiss this appeal.

We recognize this result is harsh, particularly where the parties agree that the Order for Relief should be vacated. However, “every federal appellate court has a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,’ even though the parties are prepared to concede it.”<sup>13</sup>

The dismissal of this appeal does not leave the parties without remedy. They could present the question of whether the November 12, 2009 Delaware order that transferred the case to Colorado and inaccurately stated that an order for relief had been entered in fact operated as an order for relief to the Colorado Bankruptcy Court. The Petitioning Creditors could also proceed before the

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<sup>13</sup> *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); see also *Crossingham Trust v. Baines (In re Baines)*, 528 F.3d 806, 809 (10th Cir. 2008) (every court has “an independent duty to inquire into its own jurisdiction to consider an appeal”).

Colorado Bankruptcy Court on the merits of their involuntary petition. In either case, the order issued by the Colorado court would be reviewable by this Court. There are likely other means by which the parties below could move their case forward. The present appeal is not one of them.

### **III. Conclusion**

Lacking appellate jurisdiction to review an order of the United States Bankruptcy Court for the District of Delaware issued after that court had transferred venue of the case to Colorado, we therefore DISMISS this appeal.