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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ELIZABETH C. MITCHELL, Debtor.	BAP No. CO-11-086
ELIZABETH C. MITCHELL, Appellant, v. JEFFREY WEINMANN, WILLIAM RICHEY, LOIS ALCORN, THOMAS L. ALCORN, BOULDER NETWORKS, LLC, OPUS TECHNOLOGY, LLC, DANIEL A. NOVEN, RUSSEL TORTERE, WAYNE PRATT, and UNITED STATES TRUSTEE, Appellees.	Bankr. No. 07-10718 Chapter 7 OPINION*

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

Before CORNISH, RASURE, and SOMERS, Bankruptcy Judges.

SOMERS, Bankruptcy Judge.

Elizabeth C. Mitchell ("Mitchell") appeals the bankruptcy court's order denying her motion to reopen her dismissed involuntary case and the order denying reconsideration of that order. Mitchell seeks to reopen her dismissed involuntary case in order to file claims against Lois Alcorn, Thomas Alcorn, and

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

Daniel Noven (the "Petitioning Creditors") and Jeffrey Weinman, her former counsel, under 11 U.S.C. § 303(i).[1] This appeal turns on whether the bankruptcy court abused its discretion in thrice refusing to set aside a settlement agreement between Mitchell and the Petitioning Creditors. We agree with the bankruptcy court that Mitchell has failed to set forth any valid grounds warranting relief from the order approving the settlement and that it is not appropriate to reopen her bankruptcy case.

I. Factual Background

On January 30, 2007, the Petitioning Creditors filed two involuntary Chapter 7 petitions, one against Mitchell, Case No. 07-10718, and the other against an affiliate, Chameleon Entertainment Systems, Inc. ("Chameleon"), Case No. 07-10719.[2] These two cases were jointly administered at Mitchell and Chameleon's behest.[3]

On March 1, 2007, in each involuntary case, Mitchell and Chameleon filed a Combined Motion to Dismiss, for Damages, Sanctions and Attorneys' Fees, or in the Alternative, to Abstain (the "First Motion to Dismiss").[4] In that motion, Mitchell and Chameleon attacked the involuntary petitions for failing to comply with § 303(b)(1)'s requirements. They also alleged that the petitions had been

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[1] All future references to "Code," "Section," and "§" are to title 11, United States Code (2007), unless otherwise specified. All future references to "Rule" refer to the Federal Rules of Civil Procedure or the Federal Rules of Bankruptcy Procedure; those denominated in the thousands are Bankruptcy Rules, and those with a single or double digit denomination are Civil Rules.

[2] Involuntary Petition(s), *in* Mitchell and Chameleon's joint Appellants' Appendix-Amended ("App.") at 36-39. Many of the pleadings in the appendix contain hand-written notes on them. The Court ignored the hand-written notes on these pleadings as improper argument.

[3] *See* Motion for Joint Administration of Cases, *in* the Petitioning Creditors' Appendix of Appellees ("Supp.App.") at 1-3; Order For Joint Administration, *in* Supp.App. at 4-5.

[4] First Motion to Dismiss, *in* App. at 40-54.

filed in bad faith and sought damages under § 303(i) or Rule 9011. Alternatively, they asked the bankruptcy court to abstain from hearing the cases altogether.

At a status conference on March 22, 2007, the bankruptcy court directed Mitchell and Chameleon to file a list of creditors by April 6, 2007, and set a deadline of April 23, 2007, for creditors to join the involuntary petitions.[5] On April 6, 2007, Mitchell and Chameleon filed a list of creditors in their respective cases.[6] On April 20, 2007, three creditors, Opus Technology, LLC, Boulder Networks, LLC, and Russell Tortere, joined the involuntary petitions against Chameleon.[7]

At a status conference on April 25, 2007, the bankruptcy court set a hearing date of September 11, 2007 for the First Motion to Dismiss.[8] On September 10, 2007, the day before the scheduled hearing, Mitchell and Chameleon filed a Notice of Impending Settlement and Motion to Vacate Hearing, which stated that: "The parties have reached a settlement with respect to both petitions and the settlement is being circulated for signature[s]."[9] That same day, the bankruptcy court entered an order vacating the hearing.[10]

On September 24, 2007, Mitchell and Chameleon filed a pleading entitled Motion to Dismiss Involuntary Petitions (the "Second Motion to Dismiss"),[11] seeking dismissal of the involuntary petitions in accordance with a Stipulation

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[5] March 22, 2007, Minutes of Proceeding, *in* App. at 142.

[6] List of Creditors, *in* App. at 143-50.

[7] Notice of Filing of Additional Joinders to Involuntary Bankruptcy Petition, *in* Supp.App. at 6-17.

[8] April 25, 2007, Minutes of Proceeding, *in* App. at 151.

[9] Notice of Impending Settlement and Motion to Vacate Hearing at 1, ¶ 4, *in* Supp.App. at 344.

[10] Order Vacating Hearing, *in* Supp.App. at 348.

[11] Second Motion to Dismiss, *in* App. at 159-72.

Resolving Involuntary Case Filings the parties had entered into (the "Settlement Agreement"). That agreement provided:

> 1. Elizabeth Mitchell Case. The involuntary case pending against Elizabeth M. Mitchell, Case No. 07-10718-MER shall be dismissed upon approval of this [Settlement Agreement] by the Bankruptcy Court. Dismissal shall be without prejudice. None of the claims held by the Petitioning Creditors against Elizabeth M. Mitchell shall be released, compromised or diminished in any way unless the Payment described below is made.
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> 2. Chameleon Entertainment Systems, Inc. Case. The case pending against Chameleon Entertainment Systems, Inc., Case No. 07-10719-MER ("Corporate Case") shall be dismissed on the later of: a) September 11, 2007; or (b) the date on which the Bankruptcy Court enters an order approving this [Settlement Agreement] ("Dismissal Date"); if and only if the Petitioning Creditors receive the sum of $75,000 in good funds by cashiers check, wire transfer or other acceptable means ("Payment"). In the event no objections are filed with respect to this [agreement] and dismissal of the cases, the Payment shall be made within three (3) days of the last date to object to the [Settlement Agreement] and a closing shall occur at that time. In the event the Payment is not made on or before the Dismissal Date, the Corporate Case shall be deemed confessed by Chameleon Entertainment Systems, Inc. and shall not be dismissed. If the Payment is made, a Non-Contested Matter Certificate may be filed and the case dismissed, if the Payment is not made the Non-Contested Matter Certificate may be filed and the order for relief shall enter.
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> 4. Release of Involuntary Case Claims. All claims asserted by the Debtors in the Response against the Petitioning Creditors shall be and are hereby withdrawn, released, and waived with prejudice. Neither Debtor shall seek any form of damage, sanction, attorneys fee, or other claim as against the Petitioning Creditors by virtue of their filing, prosecuting, or pursuing the involuntary bankruptcy cases against the Debtors. This Release includes but is not limited to, any claims that may be brought under 11 U.S.C. § 303(i) which claims are specifically waived ("Involuntary Case Claims").
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> . . . .
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> 6. Failure of Payment. In the event that the Petitioning Creditors do not receive the Payment as set forth herein, the Corporate Case shall be confessed and an order for relief shall enter and the case of Elizabeth M. Mitchell shall remain dismissed, however, the Petitioning Creditors shall retain all claims against both Debtors. The Debtors shall retain all defenses against the creditor claims which may be asserted by the Petitioning Creditors. The Involuntary

Case Claims shall remain released under all circumstances.[12]

Mitchell signed the settlement agreement individually and on behalf of Chameleon. Notice pursuant to then Local Bankruptcy Rule 202 was sent of the Second Motion to Dismiss and of the Settlement Agreement, with an objection date of October 15, 2007.[13] The certificate of service attached to the notice reflected it was sent to Mitchell, Chameleon, the Petitioning Creditors, their attorney, Lee Kutner, Weinman, Weinman's colleague William A. Richey,[14] Wells Fargo Bank, Johannsen, Sorwick & Assoc., Inc., and the United States Trustee, as well as Boulder Networks, LLC, Russell Tortere, and Opus Technology, LLC. Notice, however, was not sent to the nonpetitioning, nonjoining creditors on the List of Creditors filed on April 6, 2007.

No objections were filed, nor was a certificate of noncontested matter submitted. On January 8, 2008, Weinman, on behalf of Mitchell and Chameleon, filed a Motion for Entry of Orders, requesting the entry of an order of dismissal in Mitchell's case and an order for relief in Chameleon's case as the funds required to dismiss the corporate case had not been paid.[15] A copy of the motion was mailed to Mitchell. On February 6, 2008, the bankruptcy court dismissed Mitchell's case, *see* Order Dismissing Involuntary Case (the "Dismissal Order"), and entered an Order for Relief in Chameleon's case.[16]

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[12] Settlement Agreement, *in* App. at 162-63.

[13] Notice Pursuant to Local Rule 202 of the [Second] Motion to Dismiss, *in* App. at 173-77.

[14] William A. Richey is an associate at Weinman & Associates, P.C. who filed an entry of appearance on behalf of Mitchell and Chameleon. Bankruptcy Docket, Doc. 6, *in* App. at 9. None of Mitchell's allegations against her former attorneys mention Richey.

[15] Motion for Entry of Orders, *in* App. at 178-80; Bankruptcy Docket, Doc. 31, *in* App. at 6.

[16] Dismissal Order, *in* App. at 181; Order for Relief, *in* App. at 182.

(continued...)

Approximately one and one-half year later, Mitchell filed a Complaint for Fraud for Filing an Involuntary Petition in Bankruptcy and Fraud in the Inducement to Enter into a Settlement Agreement (the "Complaint").[17] On June 10, 2009, the bankruptcy court dismissed the Complaint, stating "[t]he Court finds the underlying bankruptcy case, 07-10718 MER, was dismissed by this Court on February 8 (sic), 2008, therefore this Court does not have jurisdiction to hear the claims for relief set forth in the Complaint."[18]

On March 14, 2011, over three years after the original case had been dismissed, Mitchell filed a Motion to Reopen Case Due To Administrative Errors (the "First Motion to Reopen").[19] On March 28, 2011, the bankruptcy court denied Mitchell's First Motion to Reopen (the "March 28 Order"), stating:

> For all practical purposes, the [Settlement Agreement], which included the Petitioning Creditors and Mitchell as signatory parties, provided for the functional equivalent of the abandonment or withdrawal of the involuntary petition filed by the Petitioning Creditors. No order for relief in the Mitchell involuntary action was ever entered before the entire involuntary proceeding was dismissed. As a result, no bankruptcy case was ever created to be reopened at this time.[20]

On April 6, 2011, Mitchell filed a Motion to Reopen Case Due to Administrative Errors and to Alter or Amend Judgment (the "Second Motion to Reopen").[21] On April 18, 2011, she filed a Brief and Memorandum in Support of

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[16] (...continued)
Mitchell's argument that the First Motion to Dismiss is still outstanding lacks merit because these orders mooted the First Motion to Dismiss. An order disposing of the First Motion to Dismiss was unnecessary upon the entry of these orders.

[17] Complaint, *in* App. at 190-99.

[18] Order [Dismissing Complaint], *in* App. at 200.

[19] First Motion to Reopen, *in* App. at 329-34.

[20] March 28 Order at 2, *in* App. at 111.

[21] Second Motion to Reopen, *in* Supp.App. at 381-87.

Motion to Reopen and to Alter or Amend Judgment, and on April 28, 2011, she filed a Motion for Entry of Orders. On May 5, 2011, the bankruptcy court denied Mitchell's Second Motion to Reopen and the April 28 Motion for Entry of Orders (the "May 5 Order").[22]

On May 12, 2011, Mitchell filed a Motion to Reopen Case Due to Administrative Errors and to Vacate Orders (the "Third Motion to Reopen").[23] On July 19, 2011, Mitchell filed a Memorandum in Support of Motion to Reopen and Submission of New Evidence. On July 27, 2011, the bankruptcy court denied Mitchell's Third Motion to Reopen (the "July 27 Order"), stating in pertinent part:

> Mitchell's [] motions must be denied for two reasons. First, as noted above, no bankruptcy case exists to which motions to reopen could apply. [Mitchell has not] shown grounds for the Court to alter or amend the findings in the Court's May 5, 2011 Order that no case ever existed to be reopened.
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> Second, in the alternative, even if a case existed which could be reopened, neither movant has shown reopening such a case would benefit the Debtor, the estate, or any creditors. Although Mitchell alleges she wishes to pursue adversary proceedings for damages against Mr. Weinman and the attorney for the petitioning creditors, she has not shown such actions would result in payment for any creditors of the estate of the hypothetical reopened case, nor has she shown the likelihood of payment to an extent which would lead to a surplus available for return to her upon liquidation of her claims . . . . With respect to the issues Mitchell raises in her Motion and Brief, and with respect to any issues Pratt may raise, the Court finds this Court is not the appropriate forum in which to pursue them. Since the Court finds it is not appropriate to reopen the case, any requests for reconsideration must also be denied.[24]

On August 5, 2011, Mitchell sought reconsideration of the July 27 Order.[25] On September 2, 2011, the bankruptcy court denied Mitchell's motion for

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[22] May 5 Order, *in* App. at 484-86. This order is almost identical to the March 28 Order.

[23] Third Motion to Reopen, *in* App. at 353-98.

[24] July 27 Order, *in* App. 82-84 (footnote omitted). Pratt did not appeal.

[25] Motion to Reconsider, *in* App. at 533-54.

reconsideration (the "Reconsideration Order").[26] Mitchell appeals both the July 27 Order and the Reconsideration Order to this Court.[27]

II. Appellate Jurisdiction and Standard of Review

This Court has jurisdiction over this appeal. Mitchell timely filed her notice of appeal from the bankruptcy court's final orders and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Colorado.[28]

We review orders denying motions to reopen a case for abuse of discretion.[29] Likewise, a bankruptcy court's denial of a motion for reconsideration is reviewed for abuse of discretion.[30] Jurisdictional questions, however, are reviewed *de novo*.[31]

III. Discussion

Chameleon had also sought to reopen its case, and likewise appealed the bankruptcy court's order denying its motion to reopen and alter, and the order denying its motion for reconsideration of that order. Chameleon's appeal, BAP

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[26] Reconsideration Order, *in* App. at 88-96.

[27] Amended Notice of Appeal, *in* App. at 625-27.

[28] 28 U.S.C. § 158(b); Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a); *In re Riazuddin*, 363 B.R. 177, 182 (10th Cir. BAP 2007) (order denying motions to reopen was a final order for purposes of 28 U.S.C. § 158(a)); *In re San Miguel Sandoval*, 327 B.R. 493, 505 (1st Cir. BAP 2005) (Bankruptcy court order denying reconsideration is "final" appealable order if underlying order was final appealable order, and together the orders end litigation on merits.).

[29] *In re Woods*, 173 F.3d 770, 778 (10th Cir. 1999); *Redmond v. Fifth Third Bank*, 624 F.3d 793, 798 (7th Cir. 2010).

[30] *In re Rafter Seven Ranches LP*, 362 B.R. 25, 28 (10th Cir. BAP 2007), *aff'd*, 546 F.3d 1194 (10th Cir. 2008).

[31] *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1085 (10th Cir. 1994) (jurisdiction is a question of law we review *de novo*); *Korngold v. Lloyd (In re S. Med. Arts Cos., Inc.)*, 343 B.R. 250, 254 (10th Cir. BAP 2006) (Whether a bankruptcy court has subject matter jurisdiction is an issue of law that we review *de novo*.).

No. CO-11-087, and this appeal, BAP No. CO-11-086, were companioned for briefing and oral argument.[32] Although they raise similar arguments, we write separate opinions because the facts vary sufficiently to warrant it.[33]

Although Mitchell appeals on numerous grounds, they can be divided into three major categories. First, she challenges the bankruptcy court's jurisdiction to approve the Settlement Agreement and enter the Dismissal Order. She argues that the bankruptcy court lacked jurisdiction to enter these orders because she raised jurisdictional concerns in her First Motion to Dismiss, which the bankruptcy court should have decided as a threshold issue. Second, even if it had jurisdiction, she contends that the bankruptcy court erred when it entered the Dismissal Order without notice to all creditors and without a hearing. Third, in denying her motions to reopen and reconsider, she contends that the bankruptcy court erroneously ruled that (1) no bankruptcy case had ever been created, and (2) it lacked jurisdiction to review her claims that the Settlement Agreement was the result of improper actions by the parties' attorneys.[34]

A. Jurisdiction of the bankruptcy court.

1. In general

Congress established the jurisdiction of the bankruptcy court in title 28. Section 1334 of title 28 provides that "the district court shall have original and exclusive jurisdiction of all cases under title 11," and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related

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[32] Order Companioning Cases dated October 11, 2011, BAP No. CO-11-086, Doc. 29. We heard oral argument telephonically on April 26, 2012.

[33] To the extent there is an overlap between the two cases, we incorporate our separate opinion issued today in *In re Chameleon Entm't Sys., Inc.*, BAP No. CO-11-087.

[34] Appellants' Amended Br. at 31.

to cases under title 11."[35] Section 151 of title 28 provides that the bankruptcy courts are "a unit of the district court."[36] Section 157(a) of title 28 provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[37] Section 157(b)(1) then provides that bankruptcy courts "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to [appellate] review."[38] "Thus, bankruptcy court jurisdiction exists, by reference from the district courts, in three categories of proceedings: those that 'arise under title 11,' those that 'arise in cases under title 11,' and those 'related to cases under title 11.'"[39]

2. Subject matter jurisdiction and in personam jurisdiction

Subject matter jurisdiction is the statutorily conferred power of the court to hear a class of cases.[40] Bankruptcy courts have the power to hear involuntary cases as they are a class of cases that arise under the Code. The filing of the

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[35] 28 U.S.C. § 1334(a)-(b).

[36] 28 U.S.C. § 151.

[37] 28 U.S.C. § 157(a).

[38] 28 U.S.C. § 157(b)(1).

[39] *Trusted Net Media Holdings, LLC v. Morrison Agency, Inc. (In re Trusted Net Media Holdings, LLC)*, 550 F.3d 1035, 1039 (11th Cir. 2008) (en banc) (internal quotation marks omitted). *See also Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997). A bankruptcy judge may also hear a proceeding that is not a core proceeding but that is otherwise "related to" a case under title 11. In such a proceeding, however, the bankruptcy judge is required to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge . . . ." 28 U.S.C. § 157(c)(1).

[40] *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

involuntary petitions commenced a case under title 11.[41] Thus, the bankruptcy court had subject matter jurisdiction over Mitchell's involuntary case.

Likewise, the bankruptcy court had in personam jurisdiction over Mitchell. At oral argument, Mitchell argued that the bankruptcy court lacked personal jurisdiction over her as she has never been adjudicated a debtor. Mitchell provided no authority for this proposition. The House Report accompanying the predecessor statute to the current 28 U.S.C. § 1334 states that the intent of the statute was to ensure that "[t]he bankruptcy court is given *in personam* jurisdiction as well as *in rem* jurisdiction to handle everything that arises in a bankruptcy case."[42]

3. The requirements of § 303(b) are not jurisdictional

Mitchell contends the bankruptcy court lacked jurisdiction to approve the Settlement Agreement and enter the Dismissal Order because it failed to first determine whether the threshold requirements of jurisdiction and standing had been satisfied as to the involuntary petitions. We reject Mitchell's argument that the bankruptcy court had no authority or jurisdiction to enter any orders without first deciding the merits of the involuntary petitions.

Section 303(a) provides that "[a]n involuntary case may be commenced

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[41] *Personette*, 204 B.R. at 771 ("A proceeding 'arises under' the Bankruptcy Code if it asserts a cause of action created by the Code[.]"). *See also Robinson v. Mich. Consol. Gas Co.*, 918 F.2d 579, 583 (6th Cir. 1990) (the term "cases under title 11" signify an action commenced with the filing of a petition pursuant to sections 301, 302 or 303); *Wood v. Ghuste (In re Wood)*, 216 B.R. 1010, 1013 (Bankr. M.D. Fla. 1998) (same).

[42] H.R. Rep. No. 95–595, at 445, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6400. *See also In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 252 (S.D.N.Y. 2004) ("In stating that '[a]n involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title,' and authorizing a bankruptcy court to 'order relief against the debtor in an involuntary case,' 11 U.S.C. §§ 303(b) & (h), the Bankruptcy Code makes clear that a bankruptcy court exercises power pursuant to Section 303 *in personam* against the debtor as well as *in rem* with respect to the debtor's estate, 'wherever located and by whomever held.'") (emphasis omitted).

only under chapter 7 or 11 of this title, and only against a person . . . that may be a debtor under the chapter under which such case is commenced."[43] Section 303(b) states:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –
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> > (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $12,300(*) more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; [or]
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> > (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under sections 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $12,300(*) of such claims[.][44]

The language in § 303(b) contains no explicit reference to its requirements being jurisdictional in nature.[45] Nowhere in § 303(b) does the word "jurisdiction" appear.

Section 303(c) suggests that Congress did not intend § 303(b)'s requirements be necessary to the bankruptcy court's subject matter jurisdiction. Section 303(c) states that a creditor who has not joined in an involuntary petition

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[43] 11 U.S.C. § 303(a).

[44] 11 U.S.C. § 303(b). In Mitchell's First Motion to Dismiss, she argued, *inter alia*, that the three-petitioner requirement and the undisputed-claim requirement had not been met.

[45] In *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006), the Supreme Court instructed courts to look at the language in a statute to determine whether Congress granted them subject matter jurisdiction, stating:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

See also id. at 515-16.

may be added as a petitioning creditor "before the case is dismissed or relief is ordered."[46] The statute therefore grants the court the power to permit more creditors to join a petition that may otherwise be dismissed. Holding that a bankruptcy court lacks jurisdiction over an involuntary case because the petition was defectively filed would render § 303(c) superfluous.

Sections 303(h) and (j) also suggest that bankruptcy courts do not have to consider *sua sponte* at any point in the proceedings if the filing requirements have been met. Subsection (h) provides that if an involuntary petition "is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed."[47] Subsection (j) states "[o]nly after notice to all creditors and a hearing may the court dismiss a petition filed under this section– (1) on the motion of a petitioner; (2) on consent of all petitioners and the debtor; or (3) for want of prosecution."[48] Thus, the statutory scheme contemplates that relief will be granted immediately if no timely response is filed, or dismissed by motion or consent after notice and a hearing.

Mitchell cites *Bartmann v. Maverick Tube Corp.*[49] as support for her argument that the bankruptcy court must first determine that creditors have standing and that the debtor generally has not been paying its debts as they become due. We find Mitchell's reliance upon *Bartmann* misplaced. *Bartmann* is inapposite as the Tenth Circuit did not consider whether § 303(b)'s requirements were jurisdictional in nature. *Bartmann* is also factually distinguishable because the putative debtor never entered into an agreement that contemplated confessing his insolvency and inability to pay his debts.

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[46] 11 U.S.C. § 303(c).

[47] 11 U.S.C. § 303(h).

[48] 11 U.S.C. § 303(j).

[49] 853 F.2d 1540 (10th Cir. 1988).

All circuits considering whether the requirements of §303(b) must be satisfied to confer subject matter jurisdiction over an involuntary case upon the bankruptcy court have concluded that § 303(b)'s filing requirements are not subject matter jurisdictional.[50] The leading commentators agree.[51] We likewise conclude that § 303(b)'s requirements are nonjurisdictional in character. In other words, they do not have to be met in order for the bankruptcy court to have jurisdiction over a § 303 proceeding. The bankruptcy court had subject matter jurisdiction over Mitchell's involuntary case upon the filing of the involuntary petition against her. Challenging whether the involuntary petition met § 303(b)'s requirements did not strip the bankruptcy court of its jurisdiction over the case.

4. No withdrawal of reference

Mitchell argues that if the Settlement Agreement was a withdrawal of the petitions, then "the bankruptcy court ruled contrary to [Rule] 5011, which requires district court approval for the withdrawal of an involuntary petition pursuant to a motion under [Rule] 41."[52] This argument lacks merit. Rule 5011 governs motions for withdrawal of the reference to a bankruptcy court pursuant to

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[50] *Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156, 169 (2d Cir. 2010) ("the restrictions of § 303 fall decisively on the nonjurisdictional side of *Arbaugh*'s bright line"); *Trusted Net Media Holdings, LLC v. Morrison Agency, Inc. (In re Trusted Net Media Holdings, LLC)*, 550 F.3d 1035, 1041 (11th Cir. 2008) (en banc) (collection of cases); *In re Rubin*, 769 F.2d 611, 615 (9th Cir. 1985) (the undisputed claims requirement is not jurisdictional; bankruptcy court is not without jurisdiction prior to determination whether creditors' claims are subject to bona fide disputes).

[51] *See* 2 *Collier on Bankruptcy* ¶ 303.08[2], at 303-22 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012) ("The circuits are in agreement that the requirements of section 303(b) – that is, the type of claims that petitioning creditors may have, and the proper number of petitioning creditors – are not jurisdictional and may be waived."); 2 William L. Norton Jr., *Norton Bankr. L. & Prac. 3d* § 22:3, at 22-9-10 (2012) ("Like the three-petitioner requirement, the undisputed-claim requirement is not jurisdictional, but goes to the merits. If the point is contested, petitioners cannot prevail unless they show that their claims are not subject to bona fide dispute, but the bankruptcy court is not without jurisdiction prior to the determination.") (footnotes omitted).

[52] Appellants' Amended Br. at 30-31.

28 U.S.C. § 157(d), requiring that such motions be determined by the district court.[53] Rule 5011 does not relate to withdrawals of pleadings or voluntary dismissals. Because there is nothing in the record indicating the reference to the bankruptcy court had been withdrawn, the bankruptcy court maintained jurisdiction over the case.

5. No joint involuntary petition

Mitchell argues that the bankruptcy court lacks subject matter jurisdiction over this case because an individual and a separate corporate entity can never be the subject of an involuntary petition.[54] She claims that Chameleon is listed as a 'debtor' in her case, which makes "this case a 'joint involuntary bankruptcy proceeding' for which there is no jurisdiction."[55]

Section 303(a) specifically directs that an involuntary petition may be commenced "only against a person . . . that may be a debtor under the chapter under which such case is commenced." The use of the words "person" and "debtor" in the singular suggests that an involuntary joint petition is not contemplated under the Code. Contrary to Mitchell's assertions, this case does not involve a joint involuntary petition. The Petitioning Creditors filed separate involuntary petitions against Mitchell and Chameleon. The fact that the bankruptcy court docket lists two debtors in the case does not establish a joint involuntary petition had been filed. Chameleon was added as a debtor in Mitchell's case upon the entry of the Order for Joint Administration, which was at Mitchell and Chameleon's behest. Because Mitchell's case did not involve a joint involuntary petition, the bankruptcy court had jurisdiction over Mitchell's case.

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[53] 9 *Collier on Bankruptcy* ¶ 5011.01[1], at 5011-3 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 16th ed. 2012).

[54] Appellants' Amended Br. at 30.

[55] Third Motion to Reopen at 2, ¶ 9, *in* App. at 354.

In sum, we conclude the bankruptcy court had jurisdiction to approve the Settlement Agreement, enter the Dismissal Order, and the orders appealed. Because we have concluded that the bankruptcy court had jurisdiction, the bankruptcy court's failure to specifically address Mitchell's jurisdictional arguments was harmless error.

B. The Dismissal Order was not void for lack of notice and hearing.

Mitchell argues the bankruptcy court should have reopened the case to decide if the Dismissal Order was void due to lack of notice to all creditors and a hearing.[56] Section 303(j)(2) provides that "[o]nly after notice to all creditors and a hearing may the court dismiss a petition filed under this section . . . on consent of all petitioners and the debtor." It is undisputed that notice of the Second Motion to Dismiss was sent to the parties to the Settlement Agreement, their attorneys, as well as to the joining creditors. Notice, however, was not sent to the nonpetitioning, nonjoining creditors on the List of Creditors filed on April 6, 2007 (the "Other Creditors") and no hearing was held.

The bankruptcy court held that notice to the Other Creditors was not required as an order for relief had not yet been entered in the case.[57] We disagree. Rule 1017(a) requires that a list of creditors be filed for notice purposes within the time frame fixed by the court.[58] This requirement would be unnecessary if Rule 1017(a) and § 303(j) applied only after the entry of an order for relief. Thus, the bankruptcy court erred in finding notice was not required as to the

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[56] Appellants' Amended Br. at 27-28.

[57] Reconsideration Order at 7, *in* App. at 94.

[58] The bankruptcy court had previously ordered Mitchell to file a list of creditors by April 6, 2007. Thereafter, the listed creditors were entitled to receive notice of any proposed dismissal due to settlement pursuant to Rule 2002. The motions seeking approval of the Settlement Agreement and entry of a dismissal order were filed on September 24, 2007 and January 8, 2008, respectively; thus, notices of those motions should have been sent to the listed creditors.

Other Creditors.[59]

Mitchell, however, may not rely on lack of notice and a hearing as grounds for her appeal because she invited the error. Mitchell sought approval of the Settlement Agreement and entry of the order dismissing her case without requesting a hearing. Mitchell, through her attorney, filed the Local Rule 202 Notice. The lack of notice to the Other Creditors falls on her shoulders.[60] "The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error."[61] Moreover, a plaintiff generally must assert her own legal rights and interests, and cannot rest her claim to relief on the legal rights or interests of third parties.[62] Mitchell's lack of notice and hearing argument is an attempt to invoke the rights of the Other Creditors and not her own. The purpose of requiring notice to all creditors and a hearing prior to dismissal of an involuntary petition is to avoid the filing of involuntary cases followed by "collusive settlements between the petitioning creditors and the debtor[.]"[63] Such collusive settlements are avoided by permitting creditors who are not being fairly treated to intervene if they are eligible to join as petitioning creditors. Thus, the purpose of Rule 303(j) is to

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[59] *In re Taub*, 150 B.R. 96, 97 (Bankr. D. Conn. 1993) ("The weight of authority suggests that § 303(j) applies to dismissals sought before an order for relief has entered.").

[60] Mitchell blames her attorney for this oversight. The Supreme Court, however, has held that clients must be held accountable for the acts and omissions of their attorneys. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993).

[61] *United States v. Edward J.*, 224 F.3d 1216, 1222 (10th Cir. 2000) (internal quotation marks omitted).

[62] *See Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) (ordinarily, party may not assert rights of others to justify relief for himself or herself).

[63] 2 *Collier on Bankruptcy* ¶ 303.34 at 303–117 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012).

protect nonpetitioning creditors, not the debtor or the petitioning creditors.[64] None of the Other Creditors or the joining creditors have filed an appeal of the Dismissal Order, the July 27 Order, or the Reconsideration Order, which indicates they do not wish to pursue their legal rights in this case.

C. Merits of the Appealed Orders.

1. The underlying July 27 Order

In her Third Motion to Reopen, Mitchell requested the bankruptcy court "pursuant to [§350] and [] Rule 5010 [to] **REOPEN** [her bankruptcy case] due to administrative errors contained in orders entered on 3-29-2011 and 5-6-2011 **AND** to accord [her] relief pursuant to FRCP Rule 60."[65] Mitchell sought Rule 60 relief from the May 5 Order, the Settlement Agreement, and the Dismissal Order. The July 27 Order denied Mitchell's request to reopen her dismissed case and for Rule 60 relief for two reasons: (1) Mitchell failed to show grounds to alter or amend the court's findings in the May 5 Orders that no case ever existed to be reopened; and (2) even if a case existed which could be reopened, she failed to show reopening her case would benefit the Debtor, the estate, or any creditors. The bankruptcy court also stated that with respect to setting aside the Settlement Agreement, it was not the appropriate forum in which to pursue that claim.

a. The bankruptcy court did not abuse its discretion in refusing to reopen Mitchell's dismissed case under § 350(b) or Rule 5010.

Section 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or

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[64] *But see In re Colon*, No. PR-07-053, 2008 WL 8664760, at *8 (1st Cir. BAP Nov. 21, 2008) (the rules governing dismissal are in place to protect *all* creditors and to give them an opportunity to join the petition prior to its dismissal).

[65] Third Motion to Reopen, *in* App. at 353. Although entered on March 29 and May 6, 2011, these orders were dated March 28 and May 5, 2011. Because these two orders are virtually identical, we will refer to them collectively as the "May 5 Orders".

for other cause."[66] Rule 5010 states "[a] case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code[.]"

Section 350 deals with cases that have been closed, not cases that have been dismissed. "The word 'reopened' used in § 350(b) obviously relates to the word 'closed' used in the same section. [Thus,] a case cannot be reopened unless it has been closed."[67] A case that is dismissed is fundamentally different from a case that is closed. Closing a case contemplates full estate administration and the completion of the bankruptcy process, whereas dismissing a case restores the assets and parties to their prepetition status, as if the case had never been filed.[68] Section 350 applies on its face only to closed cases. In other words, a dismissed case cannot be reopened under § 350(b).[69] Our analysis, however, does not end here because the bankruptcy court had authority to reopen the case if Mitchell had grounds to reinstate her bankruptcy case under Rule 60(b).[70]

b. The bankruptcy court did not abuse its discretion in denying Mitchell's Rule 60 request for relief from the May 5 Orders and the Dismissal Order.

Federal Rule of Civil Procedure 60(b), made applicable in bankruptcy by Bankruptcy Rule 9024, provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

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[66] 11 U.S.C. § 350(b).

[67] *In re Income Prop. Builders, Inc.*, 699 F.2d 963, 965 (9th Cir. 1982). See also 3 *Collier on Bankruptcy* ¶ 350.03, at 350–6 n.2 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012).

[68] *In re Woodhaven, Ltd.*, 139 B.R. 745, 747-48 (Bankr. N.D. Ala. 1992).

[69] *Singleton v. Countrywide Home Loans, Inc. (In re Singleton)*, 358 B.R. 253, 257-58 (D.S.C. 2006) (bankruptcy court had no authority to reopen dismissed case; bankruptcy court erred when it purported to reopen the dismissed case pursuant to § 350(b)). *See also* 3 *Collier on Bankruptcy* ¶ 350.03, at 350-6 n.2 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012).

[70] *In re Woods*, 173 F.3d 770, 778 (10th Cir. 1999) ("We have no trouble concluding that if Rule 60(b) relief was available and warranted, the court was justified in reopening the Woods' case for 'cause.'").

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect;
> >
> > (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> >
> > (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> >
> > (4) the judgment is void;
> >
> > (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> >
> > (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> > (1) Timing. A motion under Rule 60(b) must be made within a reasonable time–and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

The standard of review for denial of a Rule 60(b) motion is whether the bankruptcy court abused its discretion. Relief under Rule 60(b)(6) should only be granted in extraordinary cases.[71] The burden of proof on a movant is a high one because a Rule 60(b) motion is not a substitute for an appeal.[72] An appeal of a denial of a Rule 60(b)-type motion for reconsideration raises for review only the court's order of denial and not the underlying judgment itself.[73]

In the May 5 Orders, the bankruptcy court held that because no order for relief was ever entered before the entire involuntary proceeding was dismissed, no bankruptcy case was ever created to be reopened, citing *Kreidle v. Department of*

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[71] *LaFleur v. Teen Help*, 342 F.3d 1145, 1153 (10th Cir. 2003); *Amoco Oil Co. v. U.S. Envtl. Prot. Agency*, 231 F.3d 694, 697 (10th Cir. 2000); *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990).

[72] *Davis v. Kan. Dept. of Corrections*, 507 F.3d 1246, 1248 (10th Cir. 2007).

[73] *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991).

the Treasury (In re Kreidle), 146 B.R. 464 (Bankr. D. Colo. 1991), *aff'd*, 143 B.R. 941 (D. Colo. 1992) and *In re Alpine Lumber and Nursery*, 13 B.R. 977 (Bankr. S.D. Cal. 1981).[74] We agree with Mitchell that neither *Kreidle* nor *Alpine Lumber* support the bankruptcy court's conclusion that no bankruptcy case was ever created under the facts of this case. *Kreidle* is inapposite because it deals with determining the application of a tax code provision, 26 U.S.C. § 1398, which is not implicated in this case. *Alpine Lumber* is inapposite because it deals with the removal of an interim trustee appointed for cause under § 303(g).[75]

Section 303(b) provides that "[a]n involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title."[76] Section 541(a) states that "[t]he commencement of a case under section 301, 302 or 303 of this title creates an estate." Section 101(13) defines "debtor" as a person concerning which a case under this title has been commenced.[77] Read together, these provisions indicate an estate is created and a person becomes a debtor when an involuntary petition is filed, not when the order for relief is entered.[78] Thus, the bankruptcy court erred in finding that no bankruptcy case was ever created. A bankruptcy case existed during the "gap" period, which in this case, was the time between when the involuntary petition

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[74] May 5 Orders at 2 n.6, *in* App. at 485.

[75] In *Alpine Lumber*, the court noted that an involuntary case does not become a case under Chapter 7 or Chapter 11 until the order for relief is entered because it is a civil suit requesting a judgment that an order for relief be entered based on the provision of § 303(h). 13 B.R. at 979. This statement, however, does not necessarily mean that no bankruptcy case was ever created.

[76] 11 U.S.C. § 303(b). *See also* 2 *Collier on Bankruptcy* ¶ 303.08[3], at 303-23 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012) ("An involuntary case is commenced by the filing of a petition on Official Form 5.").

[77] Debtors named on an involuntary petition are often referred to as the "putative debtor" until an order for relief has been entered.

[78] *See Rushton v. Woodbury & Kesler, P.C. (In re C.W. Mining Co.)*, 440 B.R. 878, 885 (Bankr. D. Utah 2010).

was filed and when the Dismissal Order was entered.

The bankruptcy court's refusal to alter or amend its finding that no bankruptcy case was ever created, however, was harmless error because the bankruptcy court cannot grant the relief Mitchell ultimately seeks – § 303 damages against the Petitioning Creditors and her former attorney.[79] Section 303(i) provides that if an involuntary case is dismissed, other than on consent of the debtor and the petitioning creditors, and assuming the debtor has not waived its rights under § 303(i), the court may grant judgment (1) ***against the petitioners*** and in favor of the debtor for costs or a reasonable attorney's fee; or (2) ***against any petitioner*** that filed the petition in bad faith for proximate or punitive damages.[80] Pursuant to its plain language, the bankruptcy court has no authority to award § 303(i) damages against Mitchell's former attorney. If Mitchell wishes to pursue an action against her former attorney, she must do so in another forum as that action involves a nonbankruptcy tort claim.[81]

Three prerequisites must be met in order for § 303(i) damages to be assessed against the Petitioning Creditors: (1) the court must have dismissed the

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[79] None of the administrative or clear errors identified in the Third Motion to Reopen warrant vacation of the May 5 Orders. *See* Third Motion to Reopen, ¶¶ 1, 6, 8, and 12(a), *in* App. at 353-55. At most, they are harmless errors. The fact that Mitchell's involuntary case was closed in error on January 6, 2011, due to the clerk's office entry of an order accepting the Trustee's no asset report does not require an unwinding of the closing. Mitchell's case was dismissed on February 6, 2008, and should have been closed soon after. The January 6, 2011, order closing the case had no substantive effect whatsoever on her case. Likewise, the bankruptcy court's mislabeling of a pleading caption, or misstatement regarding when a pleading was filed do not affect Mitchell's substantive rights. Only errors that are harmful warrant relief.

[80] 11 U.S.C. § 303(i) (emphasis added).

[81] We reject Mitchell's implication that the bankruptcy court failed to impose sanctions under Rule 9011. Mitchell abandoned her Rule 9011 claims when she filed the Second Motion to Dismiss. Rule 9011 requires a separate motion for sanctions. We note neither Mitchell nor Chameleon filed one subsequently after the entry of the Dismissal Order. In any case, Rule 9011 sanctions may not be awarded to a client against its own attorney for a breach of duty to the client. *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730 (9th Cir. 1995).

petition; (2) the dismissal must be other than on the consent of all petitioners and the debtor; and (3) the debtor must not have waived its right to recovery under the statute.[82] The Settlement Agreement, however, is evidence that Mitchell consented to the dismissal and waived her rights to § 303(i) damages against the Petitioning Creditors.[83] In order for Mitchell to be entitled to § 303(i) damages against the Petitioning Creditors, the Settlement Agreement must be set aside.

The bankruptcy court repeatedly stated that it was "not the appropriate forum in which to pursue"[84] the claims that the Settlement Agreement was the result of improper actions by the parties' attorneys and that it "can make no findings as to such claims."[85] In the Reconsideration Order, the bankruptcy court stated:

> In this case, the resolution of questions of invalidity of the Settlement based on acts alleged to have been committed by the parties' attorneys, as well as the other issues raised by [Mitchell], are matters which could be brought in another court and therefore are not core proceedings under 28 U.S.C. § 157(a). Further, such matters do not affect the bankruptcy estate, and are therefore not "related to" matters over which this Court may exercise jurisdiction. The Court approved the Settlement based on the record before it, and cannot now find the Settlement to be invalid based on factual issues which should be raised in a court of general jurisdiction, not a court of limited jurisdiction.[86]

Mitchell argues the bankruptcy court erroneously concluded that it did not have jurisdiction to review the settlement.[87] The bankruptcy court erred to the extent it held that it was not the appropriate forum in which to set aside the Settlement

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[82] 2 William L. Norton Jr., *Norton Bankr. L. & Prac. 3d* § 22:16, at 22-41 (2012).

[83] The Settlement Agreement specifically states that §303(i) claims are waived. Settlement Agreement at 2, ¶ 4, *in* App. at 162.

[84] July 27 Order at 3, *in* App. at 84.

[85] Reconsideration Order at 8, *in* App. at 95.

[86] *Id.*

[87] Appellants' Amended Br. at 31.

Agreement. A bankruptcy court has the authority to reexamine its own order approving a settlement on a Rule 60(b) motion, and has broad discretion in determining whether such an order should be vacated and whether the matter should be reheard.[88] The bankruptcy court also erred in finding that this matter was not a core proceeding.[89] Mitchell raised this issue in order to set aside the Settlement Agreement so that she could pursue § 303(i) damages against the Petitioning Creditors and her former attorney. Section 303(i) does not create an independent cause of action.[90] A § 303(i) claim must be made in connection with the underlying proceeding in the bankruptcy court.[91] Section 303(i) creates a comprehensive remedial scheme that provides the exclusive basis for awarding damages for an improper involuntary petition.[92] Thus, the bankruptcy court is the only forum in which Mitchell may pursue §303(i) damages against the Petitioning Creditors.

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[88] *See Farmers Nat'l Bank of Osborne v. Mettlen (In re Mettlen)*, 174 B.R. 822, 826 (D. Kan. 1994) ("Bankruptcy courts have the inherent equitable power to reconsider, modify, or vacate their previous orders, including those approving settlement agreements, when the interests of justice require and no intervening rights would be prejudiced.").

[89] *See Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990) ("Core proceedings are proceedings which have no existence outside of bankruptcy. . . Actions which do not depend on the bankruptcy laws for their existence . . . are not core proceedings."); *In re R. Eric Peterson Constr. Co.*, 951 F.2d 1175, 1179 (10th Cir. 1991) (bankruptcy courts clearly retain jurisdiction to consider whether or not to award a debtor § 303(i) damages after the court has dismissed the petition for involuntary bankruptcy); *In re Glannon*, 245 B.R. 882 (D. Kan. 2000) (action for § 303(i) damages was a core proceeding; bankruptcy court retained jurisdiction over the § 303(i) aspects of the case, even after it certified the dismissal of the involuntary bankruptcy petition as final). *See also Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987) ("If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding[.]").

[90] *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259, 267 (D. Kan. 2001); 2 *Collier on Bankruptcy*, ¶ 303.33[1] at 303-104 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012).

[91] 2 *Collier on Bankruptcy*, ¶ 303.33[1] at 303-104.

[92] *Id.*

We, however, deem these errors harmless because the bankruptcy court conducted a Rule 60(b) analysis and denied Mitchell's repeated attempts to set aside the Settlement Agreement.[93] Initially, Mitchell claimed her former attorney pressured her into agreeing to the Settlement Agreement and that due to her medical condition, she did not understand the ramifications of it.[94] By Order entered March 29, 2012, the bankruptcy court declined to set aside the Settlement Agreement (the "NonVacation Order"), concluding that:

> (1) Mitchell's claims indicating she did not understand the Settlement Agreement, was mistaken or surprised by its effect or was misled by the parties' attorneys, cannot form the basis for relief from the February 6, 2008 Orders because they were untimely under Rule 60(c);
>
> (2) any claims based on Rule 60(b)(6) were not filed within a reasonable time; and
>
> (3) it would not be equitable to unwind the Settlement Agreement at this time because the Trustee had been administering the case for nearly two years and both parties had taken actions in reliance of the Settlement Agreement.[95]

For the reasons set out in our opinion in *In re Chameleon Entm't Sys., Inc.*, we conclude the bankruptcy court did not abuse its discretion in denying Rule 60 relief from the NonVacation Order.

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[93] The bankruptcy court conducted this analysis in the corporate case. *See In re Chameleon Entm't Sys.,Inc.*, BAP No. CO-11-087, slip op. at 11 (10th Cir. BAP Dec. 3, 2012) (detailing attempts to set aside the Settlement Agreement). Courts, however, may take judicial notice of proceedings and orders if they have a direct relation to the matters at hand. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) ("[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand."); *St. Louis Baptist Temple v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("[I]t has been held that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.").

[94] Complaint, *in* App. at 190-99; Debtor's Verified Motion to Set Aside That Certain Settlement Agreement Dated September 12, 2007, Case No. 07-10719, *in* App. at 201-10.

[95] *See* NonVacation Order at 4-5, *in* App. at 215, 217.

Because the bankruptcy court did not abuse its discretion in refusing to set aside the Settlement Agreement, it remains effective. As a result, Mitchell is not entitled to § 303(i) damages against the Petitioning Creditors.[96]

In sum, Mitchell has not presented to the bankruptcy court the requisite extraordinary circumstances to entitle her to relief from the May 5 Orders, the Dismissal Order, or the Settlement Agreement. Because the Settlement Agreement was not vacated, reopening Mitchell's case so that she may pursue § 303(i) damages would be futile. Thus, the bankruptcy court did not abuse its discretion in finding that it was not appropriate to reopen the case.

2. The Reconsideration Order

Bankruptcy Rule 9023 makes Civil Rule 59 applicable to bankruptcy proceedings, and a motion to reconsider is treated as a motion to alter or amend under Rule 59(e) so long as it is filed, as Mitchell's was, within the applicable time limit.[97] The standard for granting a motion to alter or amend is very strict, and typically Rule 59(e) motions are denied.[98] Such motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."[99] As stated by the Tenth Circuit, "[t]he purpose for such a motion is to correct manifest errors of law or to present newly discovered evidence."[100]

In her motion to reconsider, Mitchell alleged new evidence and clear error

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[96] We note that none of Mitchell's allegations of misconduct relating to the Settlement Agreement are directly against the Petitioning Creditors.

[97] *See, e.g.*, *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992).

[98] 11 Charles Alan Wright at al., *Federal Practice & Procedure Civil* § 2810.1 at 124-28 (2d ed. 2002).

[99] *Id.* at 127-28 (footnotes omitted).

[100] *Comm. for the First Amendment*, 962 F.2d at 1523 (internal quotation marks omitted).

as grounds for her motion. Mitchell's new evidence consisted of a compact disc purporting to contain all email communications between Weinman and her (the "CD") that purportedly shows Weinman's secretary cut and pasted her signature on a draft agreement she would not have approved. We do not consider the CD newly discovered evidence even if she obtained it after the Motion to Reopen and Alter. If the Settlement Agreement submitted to the bankruptcy court was not the actual agreement between the parties, that fact was readily ascertainable on September 24, 2007, the day the Settlement Agreement was submitted to the bankruptcy or soon thereafter. Because the bankruptcy court did not enter the Dismissal Order until over four months later, Mitchell had sufficient time to raise that issue to the bankruptcy court. But Mitchell did not allege that the Settlement Agreement submitted to the court was not the version she signed until filing her Second Motion to Reopen over three years later and she did not allege Weinman's secretary cut and pasted her signature until another four months later. Mitchell's modus operandi is filing successive motions that repeat her old arguments and assert slightly different and sometimes new arguments altogether.

Mitchell's clear error arguments are essentially the same arguments she has pressed on appeal. Having concluded the bankruptcy court did not abuse its discretion in refusing to grant relief from the Dismissal Order or to reopen Mitchell's dismissed case, we conclude the bankruptcy court did not abuse its discretion in denying Mitchell's motion to reconsider the July 27 Order.

IV. Conclusion

Because a dismissed involuntary case may not be reopened under § 350(b) or Rule 5010 and Mitchell failed to present the requisite extraordinary circumstances to entitle her to relief from the Dismissal Order, the bankruptcy court did not abuse its discretion in entering the July 27 Order. Having concluded the bankruptcy court did not abuse its discretion as to the July 27 Order, we also conclude the bankruptcy court did not abuse its discretion in refusing to

reconsider the July 27 Order. Accordingly, we AFFIRM the July 27 Order and the Reconsideration Order.[101]

Any motion for reconsideration of this opinion is limited to no more than five pages.

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[101] Appellees' Amended Motion to Strike Appellant's Statements of Supplemental Authority (Doc. No. 152) is DENIED AS MOOT.