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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 3, 2012
Blaine F. Bates
Clerk



NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE TENTH CIRCUIT**

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| IN RE CHAMELEON ENTERTAINMENT SYSTEMS, INC.,<br><br>Debtor. | BAP No. CO-11-087 |
| CHAMELEON ENTERTAINMENT SYSTEMS, INC. and ELIZABETH C. MITCHELL,<br><br>Appellants,<br><br>v.<br><br>JEFFREY WEINMAN, WILLIAM RICHEY, LOIS ALCORN, THOMAS L. ALCORN, BOULDER NETWORKS, LLC, OPUS TECHNOLOGY, LLC, DANIEL A. NOVEN, RUSSEL TORTERE, CHAMELEON JUSTICE ASSOCIATION, LPA, ARDEN HOOPER, and UNITED STATES TRUSTEE,<br><br>Appellees. | Bankr. No. 07-10719<br>Chapter 7<br><br>OPINION* |

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

Before CORNISH, RASURE, and SOMERS, Bankruptcy Judges.

SOMERS, Bankruptcy Judge.

Chameleon Entertainment Systems, Inc. ("Chameleon") and Elizabeth C. Mitchell ("Mitchell") (collectively "Appellants") seek to reopen Chameleon's

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion.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.

bankruptcy case in order to file claims against Lois Alcorn, Thomas Alcorn, and Daniel Noven (the "Petitioning Creditors") and Jeffrey Weinman, their former counsel, under 11 U.S.C. § 303(i).[1] We must decide whether the bankruptcy court abused its discretion in thrice refusing to alter its order approving a settlement agreement between the Appellants and the Petitioning Creditors that resulted in Chameleon's confession to the involuntary petition filed against it. We agree with the bankruptcy court that Appellants have failed to set forth any valid grounds warranting relief from the order approving the settlement, and find no abuse of discretion in refusing to reopen the case.

Mitchell had also sought to reopen her dismissed involuntary case, and likewise appealed the bankruptcy court's orders denying her efforts to reopen. Mitchell's appeal, BAP No. CO-11-086, and this appeal, No. CO-11-087, were companioned for briefing and oral argument.[2] Although they raise similar arguments, we write separate opinions because the facts vary sufficiently to warrant it.[3]

## 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, Case No. 07-10719.[4] These two cases were

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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] Order Companioning Cases dated October 11, 2011, BAP No. CO-11-087, Doc. 29. We heard oral argument telephonically on April 26, 2012.

[3] To the extent there is an overlap between the two cases, we incorporate our separate opinion issued in *In re Mitchell*, BAP No. CO-11-086.

[4] Involuntary Petition(s), *in* Mitchell and Chameleon's joint Appellants' Appendix-Amended ("App.") at 36-39. Many of the pleadings in the appendix

(continued...)

jointly administered at Appellants' behest.[5]

On March 1, 2007, in each involuntary case, Appellants filed a Combined Motion to Dismiss, for Damages, Sanctions and Attorneys' Fees, or in the Alternative, to Abstain (the "First Motion to Dismiss").[6] In that motion, they attacked the involuntary petitions for failing to comply with § 303(b)(1)'s requirements. They also alleged that the petitions had been 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 Appellants 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.[7] On April 6, 2007, Appellants filed a list of creditors in their respective cases.[8] On April 20, 2007, three creditors, Opus Technology, LLC, Boulder Networks, LLC, and Russell Tortere, joined the involuntary petition against Chameleon.[9]

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.[10] The day before the scheduled hearing, Appellants filed a Notice of Impending Settlement and Motion

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4 (...continued)
contain hand-written notes on them. The Court ignored the hand-written notes on these pleadings as improper argument.

5 *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.

6 First Motion to Dismiss, *in* App. at 40-54.

7 March 22, 2007, Minutes of Proceeding, *in* App. at 142.

8 List of Creditors, *in* App. at 143-50.

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

10 April 25, 2007, Minutes of Proceeding, *in* App. at 151.

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]."[11] That same day, the bankruptcy court entered an order vacating the hearing.[12]

On September 24, 2007, Appellants filed a pleading entitled Motion to Dismiss Involuntary Petitions (the "Second Motion to Dismiss"),[13] seeking dismissal of the involuntary petitions in accordance with a Stipulation Resolving Involuntary Case Filings the parties had entered into (the "Settlement Agreement"), which provided, in pertinent part:

> 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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> . . . .
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> 4. Release of Involuntary Case Claims. All claims asserted by the

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

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

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

> 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.[14]

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.[15] 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,[16] 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 non-contested matter submitted. On January 8, 2008, Weinman, on behalf of Mitchell and Chameleon,

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

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

[16] William A. Richey, an associate at Weinman & Associates, P.C., entered an entry of appearance on behalf of Mitchell and Chameleon. Bankruptcy Docket, Doc. 8, *in* App. at 34. None of Appellants' allegations against their former attorneys, however, mention Richey.

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.[17] 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.[18] On February 12, 2008, the United States Trustee filed a notice indicating the appointment of Joseph Rosania as the Chapter 7 Trustee in the Chameleon case.[19]

On February 21, 2008, Chameleon filed a Motion to Dismiss Chapter 7 Case, or for Alternative Relief (the "Third Motion to Dismiss").[20] Chameleon sought dismissal based on Mitchell's inability to assist in the preparation of statements and schedules due to her health problems.[21] Chameleon stated that "[d]ismissal simply unburdens the Bankruptcy Court and a trustee from the responsibility of dealing with a very difficult situation, arguably without benefit to anyone."[22] Chameleon suggested dismissal would not be a disadvantage to the Petitioning Creditors as they could still pursue their claims elsewhere. Alternatively, Chameleon asked for an extension of time to prepare statements

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[17] Bankruptcy Docket, Doc. 21, *in* App. at 33; Motion for Entry of Orders, *in* App. at 178-80.

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

[19] Bankruptcy Docket, Doc. 24, *in* App. at 32.

[20] Third Motion to Dismiss, *in* App. at 184-89.

[21] *Id.* at 1-2, ¶¶ 5-10, *in* App. at 184-85.

[22] *Id.* at 2, ¶ 13, *in* App. at 185.

and schedules.[23] On September 17, 2008, after a series of hearings on Mitchell's health, the bankruptcy court denied the Third Motion to Dismiss, ordering Chameleon to file statements or schedules by October 10, 2008, and if it failed to do so, then the Chapter 7 Trustee or the Alcorns were authorized to file them.[24]

Chameleon did not file statements or schedules. The Alcorns filed the Statement of Financial Affairs and Schedules on November 10, 2008.[25] A Section 341 meeting of creditors was scheduled for January 23, 2009.

On February 17, 2009, the Chapter 7 Trustee filed a motion to dismiss Chameleon's case because neither Chameleon nor its counsel had ever appeared for scheduled Section 341 meetings of creditors.[26] The Petitioning Creditors filed an objection on April 2, 2009.

On March 10, 2009, Weinman filed a motion to withdraw as attorney for Chameleon.[27] The bankruptcy court granted the motion to withdraw on March 31, 2009.[28]

On September 18, 2009, Chameleon, represented by Philip Theune,[29] filed a Verified Motion to Set Aside That Certain Settlement Agreement Dated September 12, 2007 (the "Motion to Vacate").[30] That motion alleged that Weinman pressured Mitchell into approving the Settlement Agreement without

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23 *Id.* at 2, ¶ 14, *in* App. at 185.

24 Judgment, *in* Supp.App. at 28.

25 Statement of Financial Affairs and Schedules, *in* Supp.App. at 29-79.

26 Bankruptcy Docket, Doc. 67, *in* App. at 28.

27 *Id.*, Doc. 75, *in* App. at 27.

28 *Id.*, Doc. 86, *in* App. at 26.

29 Theune was subsequently allowed to withdraw as counsel for Chameleon on January 21, 2010. Bankruptcy Docket, Doc. 118, *in* App. at 22.

30 Motion to Vacate, *in* App. at 201-10.

providing her a copy to review with her family or confidants and misrepresented that if the settlement agreement was fully funded, she would retain her claims against the Petitioning Creditors.[31] In addition, Mitchell argued that due to her post traumatic stress disorder resulting from her medical condition, she did not understand the ramifications of the Settlement Agreement.[32]

On February 25, 2010, after Theune's withdrawal from the case, Mitchell filed a Motion to Intervene on Behalf of the Debtor. The bankruptcy court denied that motion on March 9, 2010. Mitchell filed a second motion to intervene on March 15, 2010, which was denied on March 22, 2010; and a third motion to intervene on March 25, 2010, which was denied on March 30, 2010.[33]

On March 31, 2010, the bankruptcy court denied the Motion to Vacate (the "NonVacation Order").[34] Because the Motion to Vacate had been filed more than ten days after the February 6, 2008, Dismissal Order and Order for Relief, the bankruptcy court treated it as a motion for relief from judgment pursuant to Rule 60. The bankruptcy court concluded 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);
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> (2) any claims based on Rule 60(b)(6) were not filed within a reasonable time; and
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> (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

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[31] *Id.* at 1-2, ¶ 5, *in* App. at 201-02.

[32] *Id.* at 6, ¶¶ 8-9, *in* App. at 206.

[33] Bankruptcy Docket, Docs. 126, 128, 130, 131, 133, and 134, *in* App. at 21-22.

[34] NonVacation Order, *in* App. at 213-17.

Settlement Agreement.[35]

On August 30, 2010, the Chapter 7 Trustee filed a Report of No Distribution ("Report"), which drew several objections.

On November 5, 2010, Chameleon, and an entity called the "Chameleon Justice Association," now represented by Kevin O'Shaughnessy, filed a Motion to Dismiss Chapter 7 Case for Lack of Subject Matter Jurisdiction (the "Fourth Motion to Dismiss").[36] In February and early March 2011, Mitchell, individually, filed several motions in the corporate case: (1) Motion to Vitiate All Orders of This Court in the Above Entitled Case Due to Orders Being Void and to Dismiss the Within Proceedings Due to Lack of Standing of Petitioners and Lack of Jurisdiction, (2) Motion for Entry of Order To Compel Production of Documents, and (3) Motion to Vacate Order for Relief Entered on February 6, 2008.[37] Because the Fourth Motion to Dismiss and all three of Mitchell's motions sought, *inter alia*, to set aside the Settlement Agreement, we refer to them collectively as the "Second Motion to Vacate."

On March 28, 2011, the bankruptcy court denied the Trustee's motion to dismiss and Appellants' Second Motion to Vacate (the "Multi-Order").[38] The bankruptcy court also overruled the objections to the Trustee's Report, accepted the Report, and ordered Chameleon's case be closed.

On April 6, 2011, Appellants filed a Motion to Reopen Case Due to Administrative Errors and for Reconsideration (the "Motion to Reopen and

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35 *Id.* at 4-5, *in* App. at 215-17.

36 Fourth Motion to Dismiss, *in* App. at 236-39.

37 Motion to Vitiate All Orders of This Court in the Above Entitled Case Due to Orders Being Void and to Dismiss the Within Proceedings Due to Lack of Standing of Petitioners and Lack of Jurisdiction (Doc. 177), *in* App. at 263-69; Bankruptcy Docket, Doc. 179, *in* App. at 16; and Motion to Vacate Order for Relief Entered on February 6, 2008 (Doc. 182), *in* App. at 276-86.

38 Multi-Order, *in* App. at 114-19.

Alter").[39] On July 27, 2011, the bankruptcy denied the Motion to Reopen and Alter (the "Reopen Order"), stating in pertinent part:

> In this case, Movants have not shown reopening the case would benefit the Debtor, the estate, or any creditors. The only information regarding possible assets and liabilities, the Statements and Schedules filed by the Petitioning Creditors, the *Trustee's Report of No Distribution* (August 30, 2010), and the *Trustee's Combined Response to Objections to Request for Discharge and Closing Chapter 7 Liquidation and Request for Hearing*, show the estate is insolvent. No further information was provided by the Movants to show reopening the case would result in the payment of any funds to creditors, or would result in a surplus after payment of creditors which would be available for the Debtor. Moreover, the allegations suggesting the settlement to which Ms. Mitchell agreed was different than that filed with the Court have been rebutted by the information in the Response. With respect to other issues raised by the Debtor in the Motion, 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.[40]

On August 5, 2011, Appellants sought reconsideration of the Reopen Order.[41] On September 2, 2011, the bankruptcy court denied their Motion for Reconsideration (the "Reconsideration Order").[42] Appellants appeal both the Reopen Order and the Reconsideration Order to this Court.[43]

## II. Appellate Jurisdiction and Standard of Review

This Court has jurisdiction over this appeal. Appellants timely filed their 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.[44]

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39 Motion to Reopen and Alter, *in* App. at 399-413.

40 Reopen Order at 2, *in* App. at 86 (footnotes omitted).

41 Motion for Reconsideration, *in* App. at 555-84.

42 Reconsideration Order, *in* App. at 97.

43 Amended Notice of Appeal, *in* App. at 628-30.

44 28 U.S.C. § 158(b); Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a); (continued...)

We review final orders denying motions to reconsider for abuse of discretion.[45] Likewise, a bankruptcy court's denial of a motion to reopen a case is reviewed for abuse of discretion.[46] Jurisdictional questions are reviewed *de novo*.[47]

## III. Discussion

Our analysis is complicated due to Appellants' penchant for filing repetitious motions. We count three attempts to set aside the Settlement Agreement. The first attempt was on September 18, 2009, when Chameleon filed the Motion to Vacate and claimed Mitchell did not understand the Settlement Agreement, was mistaken or surprised by its effect, and misled by the parties' attorneys.[48] Between November 2010 and March 2011, Appellants filed a series of motions in their second attempt to set aside the Settlement Agreement on additional grounds: (1) lack of subject matter jurisdiction, (2) fraud upon the court, (3) lack of notice and hearing, (4) no settlement approval in the corporate case, and (5) due process.[49] In their third bid to set aside the Settlement

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[44] (...continued)
*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.).

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

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

[47] *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084 (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*.).

[48] Motion to Vacate, *in* App. at 201.

[49] The bankruptcy court described the Second Motion to Vacate as "an effort to avoid the effect of the Settlement Agreement entered into by the Petitioning (continued...)

Agreement by way of the Motion to Reopen and Alter, Appellants argued the bankruptcy court ignored their subject matter jurisdiction argument and again asserted, *inter alia*, that the Settlement Agreement was invalid as to Chameleon because "the agreement has never been approved in [the corporate] case."[50]

**A. Motions to Reconsider in General**

Motions to reconsider are not specifically referenced in the Federal Rules of Civil Procedure. The rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Rule 59(e) or a motion seeking relief from the judgment pursuant to Rule 60(b).[51] These two rules are distinct and serve different purposes and produce different consequences.[52] Which rule applies to a motion depends on when a motion is filed.[53] A motion filed within fourteen days of entry of an order is considered a

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[49] (...continued)
Creditors, Mitchell, and Chameleon, and approved by the Court." *See* Multi-Order at 4, *in* App. at 117.

[50] Motion to Reopen and Alter at ¶¶ 3d, 9b, and 9c, *in* App. at 400-01.

[51] Rule 59(e) and Rule 60(b) are made applicable to the bankruptcy courts pursuant to Bankruptcy Rules 9023 and 9024, respectively.

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

[53] *See Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992) ("We treat Plaintiffs[‘] motion to reconsider as a motion to alter or amend the judgment because the motion was filed within ten days after the district court's order granting summary judgment and dismissing the case was entered on the docket."); *Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 703 (10th Cir. 1988), *superseded on other grounds*, *Grantham v. Ohio Cas. Co.*, 97 F.3d 434 (10th Cir. 1996) ("post-judgment motions filed within ten days of the final judgment should, where possible, be construed as Rule 59(e) motions"); *Wilson v. Al McCord, Inc.*, 858 F.2d 1469, 1478 (10th Cir. 1988) ("Because more than ten days had elapsed before the filing of the motion to reconsider, we construe it as a motion pursuant to Fed. R. Civ. P. 60(b)(6) . . . .") (citation omitted). Ten days was the time limit effective prior to December 1, 2009. Rule 59(e) currently requires a motion to alter or amend a judgment to be filed no later than 28 days after the entry of the judgment.

Rule 59(e) motion, while a motion filed after that time is a Rule 60(b) motion.[54]

A Rule 59(e) motion is only appropriate when a court has misapprehended the facts, a party's position, or controlling law.[55] Grounds warranting altering or amending a judgment include (1) an intervening change in the controlling law; (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.[56] An appeal from a ruling on a Rule 59(e) motion makes the bankruptcy court's underlying judgment subject to review by this court.[57]

Rule 60(b) provides that the court may grant relief from judgment based on one or more of the following:

> (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.[58]

In *Van Skiver*, the Tenth Circuit stated that an appeal of a denial of a Rule 60(b)-type motion for reconsideration raises for review only the court's order of

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[54] Although Civil Rule 59(e) provides a motion to alter or amend a judgment must be filed within twenty-eight days of the entry of judgment, Bankruptcy Rule 9023 shortens the deadline to file motions under Rule 59 to no later than 14 days after entry of judgment.

[55] *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[56] *Id.*

[57] *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (an appeal from the denial of a motion to reconsider construed as a Rule 59(e) motion permits consideration of the merits of the underlying judgment).

[58] Fed. R. Civ. P. 60(b).

denial and not the underlying judgment itself.[59]

Because there were multiple motions to reconsider, we must dissect the timing of each motion to determine the underlying orders subject to our review. The Motion for Reconsideration was filed within fourteen days of the Reopen Order, thus that order is reviewable. The Reopen Order denied the Motion to Reopen and Alter. Because the Motion to Reopen and Alter was filed within fourteen days of the Multi-Order, the Multi-Order is also reviewable. The motions giving rise to the Multi-Order sought reconsideration of the bankruptcy court's NonVacation Order. Because these motions were filed more than seven months after the entry of the NonVacation Order, they are Rule 60(b)-type motions.[60] Under *Van Skiver*, this Court lacks jurisdiction to review the NonVacation Order.

**B. Merits of the Underlying Orders**

**1. The Multi-Order**

In the Second Motion to Vacate, Chameleon argued that the bankruptcy court lacked jurisdiction to approve the Settlement Agreement and enter the Order for Relief because the Petitioning Creditors failed to meet § 303's requirements and fraudulently filed the petitions.[61] In the Multi-Order, the bankruptcy court summarily concluded it had jurisdiction pursuant to 28 U.S.C. §§ 1334, 157(a) and (b)(1) as this matter was a core proceeding concerning the administration of

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[59] *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). *Hawkins*, 64 F.3d at 546 (an appeal from the denial of a Rule 60(b) motion does not preserve the underlying judgment for appellate review).

[60] The NonVacation Order was filed on March 31, 2010 and the Fourth Motion to Dismiss was filed on November 5, 2010. *See* NonVacation Order, *in* App. at 213-17; Fourth Motion to Dismiss, *id.* at 236-39.

[61] *See* Fourth Motion to Dismiss, *in* App. at 236-39.

the estate.[62] The bankruptcy court denied the Second Motion to Vacate, finding Appellants lacked standing to assert the interests of creditors, equity holders, or other parties with an interest in the bankruptcy estate, as such interests are entrusted to the Chapter 7 Trustee.[63] The bankruptcy court further found that even if they had standing, no basis had been set forth to grant relief from those orders or any other others entered in the case.[64] The bankruptcy court noted that it had previously made that exact finding in the NonVacation Order.

**a. The bankruptcy court had jurisdiction to approve the Settlement Agreement, and to enter the Order for Relief and the subsequent orders appealed.**

For the reasons set out in our opinion in *In re Mitchell*, BAP No. CO-11-086, we reject Appellants' argument that the bankruptcy court lacked jurisdiction to approve the Settlement Agreement and enter the Order for Relief because it failed to first determine that the involuntary petitions met §303's requirements. Because the filing of an involuntary petition commenced a case under title 11, § 303's requirements are nonjurisdictional in nature, and there was no withdrawal of the reference to the bankruptcy court, the bankruptcy court had jurisdiction to approve the Settlement Agreement, enter the Order for Relief, and the orders appealed.[65]

**b. The bankruptcy court did not abuse its discretion in denying Rule 60(b) relief from the NonVacation Order.**

The Multi-Order denied Appellants' request for relief from the Order for Relief and the NonVacation Order. Chameleon did not timely appeal the

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62 Multi-Order at 2, *in* App. at 115.

63 *Id.* at 4, *in* App. at 117. Our decision on jurisdiction and Rule 60(b) relief makes it unnecessary for us to address the bankruptcy court's conclusions on standing or Appellants' arguments that they have standing.

64 *Id.* at 4-5, *in* App. at 117-118.

65 *See In re Mitchell*, BAP No. CO-11-086, slip op. at 9-16 (10th Cir. BAP Dec. 3, 2012).

NonVacation Order. Rule 60(b) is not intended to be a substitute for a direct appeal.[66] As stated earlier, under *Van Skiver*, we lack jurisdiction to review the NonVacation Order itself; rather, our review is limited to the bankruptcy court's refusal to disturb the NonVacation Order.

Rule 60(b) relieves an aggrieved party from a judgment on the basis of mistake, inadvertence, surprise, excusable neglect, fraud or newly discovered evidence.[67] Appellants alleged the following additional grounds in the Second Motion to Vacate: (1) fraud on the court; (2) lack of notice and hearing, (3) no settlement approval in the corporate case, and (4) due process.[68]

**i. No fraud on the court within the meaning of Rule 60(b).**

Appellants' principal allegation of fraud-on-the-court is that Thomas Johannsen, a former officer of Chameleon, entered nonexistent debts in the corporate books so that the Petitioning Creditors could file an involuntary petition against them and take over the company.[69] The Tenth Circuit has described "fraud on the court" as "fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or

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66 *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996).

67 Fed. R. Civ. P. 60(b).

68 *See* Fourth Motion to Dismiss, *in* App. at 236-39; Motion to Vitiate All Orders of This Court in the Above Entitled Case Due to Orders Being Void and to Dismiss the Within Proceedings Due to Lack of Standing of Petitioners and Lack of Jurisdiction (Doc. 177), *in* App. at 263-69; Motion to Vacate Order for Relief Entered on February 6, 2008 (Doc. 182), *in* App. at 276-84. Chameleon had previously argued mistake and surprise, which the bankruptcy court rejected in the NonVacation Order. NonVacation Order at 2-5, *in* App. at 214-17.

69 Fourth Motion to Dismiss at 2-4, *in* App. at 237-39.

perjury."[70] In *Weese v. Schukman*,[71] the Tenth Circuit stated:

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.[72]

Appellants' allegations regarding Johannsen confuse a cause of action for fraud between parties, with one for fraud on the court. The latter refers to misrepresentation affecting the judicial process.

Appellants also alleged fraud on the court by Weinman, their former attorney. They claim Weinman's secretary cut and pasted Mitchell's signature on a draft agreement she would not have approved, and that Weinman submitted an unauthorized request for entry of the Order for Relief. They claim that "Weinmann (sic) deliberately deceived the court and all other parties in interest, by couching a reference to a settlement in a Motion to Dismiss instead of seeking approval of the settlement itself and noticing his own prior submitted list of creditors."[73]

Litigants often entitle a pleading incorrectly. Mistitling a motion does not establish fraud on the court. Neither does failing to send notice of the Second Motion to Dismiss to the nonpetitioning, nonjoining creditors on the List of Creditors filed on April 6, 2007 (the "Other Creditors"). Procedural missteps by a party or its attorney open the door for the opposition to object and may be grounds for denial of the party's motion, but they do not constitute fraud on the

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[70] *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (en banc); *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002).

[71] 98 F.3d 542 (10th Cir. 1996).

[72] *Id.* at 552-53 (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)) (emphasis omitted).

[73] Motion to Vacate Order for Relief Entered on February 6, 2008 (Doc. 182) at 5, ¶ 10(*l*)(v), *in* App. at 280.

court. As to the constructed signature theory, the bankruptcy court found that allegations suggesting the settlement to which Mitchell agreed was different than that filed were rebutted by Weinman in his response to Appellants' Motion to Reopen and Alter.[74] Appellants have not provided this Court with Weinman's response. Thus, we are unable to review the bankruptcy court's implicit finding that Weinman did not commit fraud on the court based on the constructed signature theory.[75]

Appellants have pointed to no evidence that the bankruptcy court was corrupted or unduly influenced by Weinman's behavior, or that the bankruptcy court behaved with bias or was corrupted by any specific event. Appellants' various allegations of fraud simply do not rise to the level necessary to establish fraud on the court. For the foregoing reasons, we conclude the bankruptcy court did not abuse its discretion in denying Rule 60(b) relief from the NonVacation Order on the ground of fraud on the court.

**ii. The bankruptcy court's finding that the Settlement Agreement had been approved in the corporate case was not clearly erroneous.**

In the Multi-Order, the bankruptcy stated that: "In both of the February 6, 2008 Orders, the Court ruled the Settlement Agreement was approved."[76] Unlike the Dismissal Order, the Order for Relief did not specifically state that the Settlement Agreement was approved.[77] Thus, the bankruptcy court misstated this

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[74] Reopen Order at 2, *in* App. at 86 ("Moreover, the allegations suggesting the settlement to which Ms. Mitchell agreed was different than that filed with the Court have been rebutted by the information in the Response.").

[75] *McEwen v. City of Norman*, 926 F.2d 1539, 1550 (10th Cir. 1991) (appellant has duty to supply adequate record for review, and failure to do so will result in the bankruptcy court being affirmed); *see also* Fed. R. Bankr. P. 8009(b)(6); 10th Cir. BAP L.R. 8009-3.

[76] Multi-Order at 2, *in* App. at 115.

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

particular fact. Appellants did not raise this issue in the original Motion to Vacate. Instead, they waited over three years after the entry of the Order for Relief to mention this factual error. It is inappropriate for a movant to advance supporting facts which were otherwise available for presentation when the original motion was briefed.[78] We note that the Order for Relief entered by the bankruptcy court was the proposed order submitted by Appellants. "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."[79] For these reasons, we hold that the bankruptcy court's factual finding that the Settlement Agreement had been approved in the corporate case was not clearly erroneous.

**iii. The Order for Relief was not void for lack of notice and hearing.**

Appellants argue the Order for Relief was void due to lack of notice to all creditors and a hearing.[80] 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 was not sent to the Other Creditors and no hearing was held. Section 303(j)(2), however, does not apply in this case because Chameleon's case was not dismissed.[81]

**iv. The bankruptcy court did not deny Appellants due process.**

Appellants argue they were denied due process because there has never been a hearing on the merits of the involuntary petitions, especially on the issues

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[78] *Van Skiver v. United States*, 751 F.Supp. 1522, 1523 (D. Kan. 1990), *aff'd* 952 F.2d 1241 (10th Cir. 1991).

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

[80] Motion to Vacate Order for Relief Entered on February 6, 2008 (Doc. 182) at 3-6, ¶¶ 8-10, *in* App. at 278-81.

[81] The invited-error doctrine and standing principles also extinguish this argument. *See In re Mitchell*, BAP No. CO-11-086 (10th Cir. BAP Dec. 3, 2012).

raised by the First Motion to Dismiss.[82] We reject Appellants' due process argument. Due process requires notice and a meaningful opportunity to be heard.[83] An actual hearing is not required, just an opportunity to be heard.[84] An opportunity to fully brief the issue satisfies the due process requirements.[85]

Although no actual hearings were held on any of Appellants' motions, our review of the record indicates Appellants were not denied any opportunity to present their arguments or fully brief any issue. They simply disagree with the bankruptcy court's decision. Arguably, the bankruptcy court gave Appellants more leeway than most other courts would have under the circumstances.

A hearing on the First Motion to Dismiss was unnecessary because the Settlement Agreement and the Order for Relief mooted it. Appellants ignore that they requested the hearing for the First Motion to Dismiss be vacated.

For all of the above reasons, we conclude the bankruptcy court did not abuse its discretion in denying Rule 60(b) relief from the NonVacation Order or the Order for Relief.

**2. The Reopen Order**

The Reopen Order denied Appellants' request to reopen Chameleon's case and to alter or amend the Multi-Order.

**a. The bankruptcy court did not abuse its discretion in refusing to alter or amend the Multi-Order**.

A Rule 59(e) motion is only appropriate when a court has misapprehended the facts, a party's position, or controlling law. "Rule 59(e) does not allow the losing party to repeat old arguments previously considered and rejected, or to

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82 Appellants' Amended Br. at 37.

83 *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

84 *In re C.W. Mining Co.*, 625 F.3d 1240, 1244-45 (10th Cir. 2010).

85 *See Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc).

raise new legal theories that should have been raised earlier."[86]

In their Motion to Reopen and Alter, Appellants urged the bankruptcy court to alter or amend the Multi-Order because the bankruptcy court ignored its "lack of subject matter jurisdiction" argument. They then repeated their due process and "no settlement approval in the corporate case" arguments. Because we have concluded the bankruptcy court had jurisdiction over Chameleon's case, did not deny Appellants due process, and did not abuse its discretion in finding the settlement was approved in the corporate case, we conclude that Appellants did not raise any grounds that would justify altering or amending the Multi-Order. The bankruptcy court therefore did not abuse its discretion in denying Appellants' request to alter or amend the Multi-Order.

**b. The bankruptcy court did not abuse its discretion in refusing to reopen Chameleon's case.**

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 for other cause."[87] 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."[88]

In the Motion to Reopen and Alter, Appellants argued that Chameleon's case was closed in violation of Rule 62(a), which provides that "no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry."[89] This argument lacks merit. Rule 62 does not apply

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[86] *Nat'l Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990); *Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986).

[87] 11 U.S.C. § 350(b).

[88] Fed. R. Bankr. P. 5010.

[89] Fed. R. Civ. P. 62(a). *See* Motion to Reopen and Alter at 1-2, ¶ 2, *in* App. at 399-400.

to the closing of a bankruptcy case.[90] In the bankruptcy context, Rule 62 applies only in adversary proceedings. Rule 7001 lists the types of adversary proceedings, none of which encompass the proceedings involved in this case. Rule 62(a) does not apply to Chameleon's bankruptcy case and the bankruptcy court did not err by entering its order closing the case.

Appellants' endgame is § 303(i) damages against the Petitioning Creditors and Weinman, their former attorney. 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 debtor may, under certain circumstances, recover costs and, in the case of a bad faith filing, may also recover damages from the petitioning creditors.[91] Three prerequisites exist for asserting a claim for § 303(i) damages: (1) the court must have dismissed the 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.[92] Chameleon's involuntary case, however, was not dismissed. Chameleon confessed to the petition pursuant to the Settlement Agreement.[93] Chameleon, therefore, may not claim § 303(i) damages without setting aside the Settlement Agreement and the resulting Order For Relief.

Because the bankruptcy court did not abuse its discretion in denying Chameleon's request to alter or amend the Multi-Order, the Settlement Agreement

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90 *Laurent v. Herkert (In re Laurent)*, 208 F. App'x. 724 (11th Cir. 2006).

91 11 U.S.C. § 303(i).

92 2 William L. Norton Jr., *Norton Bankr. L. & Prac. 3d* § 22:16, at 22-41 (2012).

93 Settlement Agreement at ¶ 2, *in* App. at 162 ("In the event the Payment is not made on or before the Dismissal Date, the Corporate Case shall be deemed confessed by Chameleon [] and shall not be dismissed.").

stands. As a result, Chameleon is not entitled to asserting a claim for § 303 damages and assert the relief it ultimately seeks. Thus, reopening Chameleon's case would be futile. For this reason, we cannot conclude the bankruptcy court abused its discretion in finding that it was not appropriate to reopen Chameleon's case.

### C. Merits of the Reconsideration Order

In the Motion for Reconsideration, Appellants alleged new evidence and clear error as grounds for their motion. Appellants' new evidence consisted of a compact disc purporting to contain all email communications between Weinman and Appellants (the "CD") that purportedly shows Weinman's secretary cut and pasted Mitchell's 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 it was submitted to the bankruptcy court, or soon thereafter.

Appellants' clear error arguments made before the bankruptcy court are essentially the same arguments they have pressed on appeal. Having concluded that the bankruptcy court did not abuse its discretion in refusing to alter or amend the Multi-Order or to reopen Chameleon's case, we conclude the bankruptcy court did not abuse its discretion in denying reconsideration of the Reopen Order.

## IV. Conclusion

We conclude the bankruptcy court had jurisdiction to approve the Settlement Agreement and enter the Order for Relief without first determining whether the Petitioning Creditors met § 303's requirements. Likewise, the bankruptcy court had jurisdiction to enter the NonVacation Order, the Multi-Order, the Reopen Order, and the Reconsideration Order. Given the timing of Appellants' underlying motions, this Court lacks jurisdiction to review the

NonVacation Order, but may review the Multi-Order, the Reopen Order, and the Reconsideration Order.

As to the Multi-Order, we conclude the bankruptcy court did not abuse its discretion in denying Rule 60(b) relief from the NonVacation Order. With respect to the Reopen Order, we conclude the bankruptcy court did not abuse its discretion in refusing to alter or amend the Multi-Order or to reopen Chameleon's case. Having concluded the bankruptcy court did not abuse its discretion as to the Reopen Order, we also conclude the bankruptcy court did not abuse its discretion in refusing to reconsider the Reopen Order. Accordingly, we AFFIRM the Multi-Order, the Reopen Order, and the Reconsideration Order.[94]

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

[94] Appellees' Amended Motion to Strike Appellant's Statements of Supplemental Authority (Doc. No. 145) is DENIED AS MOOT.